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In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1931.

No. 98

ARIZONA GROCERY COMPANY,
Petitioner,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Respondents.

ARIZONA GROCERY COMPANY,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS.

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ARIZONA GROCERY COMPANY,
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SOUTHERN PACIFIC COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS.

Chronology

June 22, 1921: Commission rendered opinion, and issued formal continuing order in *"First Case"* (62 I. C. C. 412), prescribing reasonable maximum future rate of 96½ cents,[1] on sugar, carloads, from

[1] All rates referred to are stated in amounts per hundred

California points to Phoenix, Ariz. (R. 256).

Sept. 17, 1921: Carriers complied with order in *First Case,* by establishing rate of 96 cents (R. 257).

July 1, 1922: 96-cent rate voluntarily reduced by respondent carriers to 86½ cents. Order in *First Case* still in effect (R. 257-258).

Feb. 21, 1923: Date of movement of *first* shipment upon which reparation is sought by petitioner. Order in *First Case* still in effect (R. 255).

Jan. 10, 1924: 86½-cent rate voluntarily reduced by respondent carriers to 84 cents. Order in *First Case* still in effect (R. 258).

Feb. 5, 1925: Date of movement of *last* shipment upon which reparation is sought by petitioner. Order in *First Case* still in effect (R. 255).

Feb. 25, 1925: Effective date of Commission's opinion and order in *"Second Case"* (95 I. C. C. 244), rendered Jan. 6, 1925, prescribing, for future, reasonable maximum rate of 71 cents, and modifying order in *First Case* to that extent. Reparation on prior shipments found due, but not awarded (R. 258-260).

Feb. 8, 1927: *Second Case* reopened for further consideration, but order prescribing 71

cent rate not vacated (R. 260). 71-cent rate continued in effect.

Mar. 12, 1928: Commission rendered opinion and order in *Third Case,* (140 I. C. C. 171) prescribing future rates to Phoenix and other Arizona points; also finding that past rates to Phoenix, from and after July 1, 1922, had been unreasonable to extent they exceeded 73 cents from Northern California, and 71 cents from Southern California; and that petitioner and other shippers entitled to reparation down to that basis of rates (R. 260-261).

Mar. 11, 1929: Commission issued order for payment of reparation to petitioner (R. 261-262), with which respondents declined to comply.

Oct. 16, 1929: Complaints in instant cases filed with U. S. District Court for Arizona (R. 47, 91).

July 15, 1930: Judgments for petitioner rendered by U. S. District Court for Arizona (R. 225-230).

Mar. 23, 1931: Judgments for petitioner reversed by U. S. Circuit Court of Appeals, Ninth Circuit (R. 463-464): Opinion by Wilbur, J. (R. 438-462).

Oct. 12, 1931: Certiorari to review judgment of U. S. C. C. A., 9th Circuit, granted (R. 467).

Introductory.

The essential issue presented in this proceeding is whether the Interstate Commerce Commission has jurisdiction under the Interstate Commerce Act to make a valid order for the payment of reparation (i. e., damages) by carriers subject to the Act for the collection of alleged unreasonable freight rates, when it appears that the rates assessed and the charges collected, (with respect to which such reparation is attempted to be awarded), were equal to or less than those which the Commission had itself directly prescribed or approved as maximum reasonable rates, by valid formal findings and a valid formal continuing order, in effect without modification at the time the rates were applied and the charges collected. The Circuit Court of Appeals for the Ninth Circuit has declared, in the decision here under review (49 Fed. (2d) 563; R. 438-462), that the Commission has no such power under the Act, and that a purported order for the payment of reparation, made under the circumstances described, is invalid and unenforcible.

Statement of the Case.

While the statement of the case appearing in petitioner's brief (Brief, pp. 2-6) is largely correct, it does not present all of the facts in their proper relationship. Moreover, briefs have been filed by the Arizona Corporation Commission, and others as *amici*

curiae, in which the facts are to some extent inaccurately stated. The essential facts are set forth rather completely, in the opinion of the Circuit Court (R. 438-453). Briefly, they are as follows:

On June 22, 1921, the Interstate Commerce Commission rendered its opinion and order (R. 263-275) in:

Traffic Bureau, Phoenix Chamber of Commerce v. Director General, et al., 62 I. C. C. 412.

In that decision (hereinafter referred to as the *First Case*) the Commission found that, for the future, reasonable rates on sugar, in carloads, from all points in California to Phoenix, Arizona, should not exceed 96½ cents. The defendant carriers were ordered to establish, on or before September 17, 1921, and thereafter to maintain until the Commission's further order, rates not exceeding the figure named. The carriers complied with the order by establishing (September 17, 1921) a rate of 96 cents. That rate was afterwards twice voluntarily reduced: first to 86½ cents (July 1, 1922), and later to 84 cents (January 10, 1924).

On January 6, 1925, in response to a complaint filed November 3, 1922, the Commission rendered its opinion and order (R. 276-290) in the so-called *Second Case*:

Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., 95 I. C. C. 244.

In that decision the Commission found that the 84-cent rate then in effect was, and in future would be, unreasonable, and ordered that it be reduced to not more than 71 cents, from and after February 25, 1925. The carriers duly complied with the order, and established the 71-cent rate on the date specified.

The Commission also undertook to *find*, in the *Second Case*, that reparation was due upon shipments moving prior to the effective date of its order, and during the period when the order in the *First Case* was still in effect; but no *order* for the payment of reparation was actually made. The *Second Case* was subsequently reopened (February 8, 1927: R. 260), and consolidated with a number of other reparation cases in which rates on sugar to Phoenix and other Arizona points were under attack. These consolidated proceedings were decided on March 12, 1928, in the so-called *Third Case:*

> *Traffic Bureau, Phoenix Chamber of Commerce v. The A. T. & S. F. Ry. Co., et al.*, 140 I. C. C. 171.

In that decision (R. 290-309) the Commission modified its conclusions in the *Second Case* with respect to the future, by prescribing a rate of 73 cents from Northern California points to Phoenix, instead of the 71-cent rate previously ordered. *It did not attempt to make that finding retroactive, so as to increase charges collected under the 71-cent rate.* It also undertook to find that rates in effect during the period prior to the decision in the *Second Case*, while the continuing order

in the *First Case* was still in effect and unchanged, had been unreasonable; that petitioner and other shippers, who had made shipments under such rates and paid charges based thereon, had been damaged thereby and were entitled to reparation, to the extent that the charges paid exceeded those accruing under rates thus retroactively determined to have been unreasonable. In due course, the Commission issued its formal order (March 11, 1929), directing respondents to pay such reparation (R., 46-47), but allowed no off-setting credit, in favor of the respondents, on account of the difference between the 71-cent rate first ordered in effect, and the 73-cent rate later found reasonable from Northern California.

All of petitioner's shipments as to which reparation was awarded moved during the period between February 21, 1923, and February 10, 1925. The charges thereon were based upon the rates of 86½ cents and 84 cents, successively in effect during that period, maintained by respondents pursuant to authority of, and in compliance with, the order in the *First Case*, then outstanding and unmodified.

Respondents declined to comply with the reparation order of March 11, 1929; and petitioner thereafter brought suit in the United States District Court for Arizona. Its suits were consolidated, and submitted upon an agreed statement of facts (R., 254-319), to the trial court sitting without a jury. That court ruled that the reparation order sued upon was valid,

and after making special findings of fact and conclusions of law (R., 355-375), rendered judgments for petitioner (R., 228-230). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgments were reversed (R., 463-464), that court having concluded, as before stated, that the Commission's reparation order was void and of no effect.

Statutes Relied Upon.

The relevant portions of the statutes relied upon are set forth in the Appendix to this brief. They consist of the following portions of the Interstate Commerce Act:

Section 1, paragraphs 4, 5 (49 U. S. C. 1, 4, 5; 34 Stat. 584, as reenacted in 1920, 41 Stat. 474);
Section 8 (49 U. S. C. 8; 24 Stat. 382);
Section 9 (49 U. S. C. 9; 24 Stat. 382);
Section 12, paragraph 1 (49 U. S. C. 12, 1; 26 Stat. 743);
Section 16, paragraph 1 (49 U. S. C. 16, 1; 41 Stat. 491).

Summary of Argument.

I. The rates assessed, and the charges collected, upon petitioner's shipments, were conclusively established as just and reasonable, and in conformity with the requirements of the Interstate Commerce Act and of the Commission's valid findings and valid continuing order.

(a) The Commission's findings and order in the *First Case* were continuously in effect, without modification, throughout the period of movement of petitioner's shipments, and were fully and literally complied with by the respondents.

(b) The findings and order in the *First Case*, whereby the rate to be observed in future was determined, were made by the Commission in the exercise of its quasi-legislative power.

(c) The Commission, by its findings and order in the *First Case*, prescribed the maximum just and reasonable rate thereafter to be maintained, until its further order.

(d) Having been validly made, and in full force and effect at the time petitioner's shipments moved, the findings and order in the *First Case* constituted a conclusive determination that the rates established and charged in compliance therewith were just and reasonable.

II. The Interstate Commerce Act does not confer jurisdiction upon the Commission to award reparation for the charging of rates maintained and applied in conformity with the Commission's valid outstanding findings and valid continuing formal order.

(a) The Act confers upon the Commission jurisdiction to award reparation (damages) only for violations of the Act by carriers.

(b) The Commission's determination in the *First Case* having been conclusive, respondents'

compliance therewith completely fulfilled their obligation to maintain and apply reasonable rates upon petitioner's shipments. Their obedience to the Commission's findings and order could not, in legal contemplation, have been in violation of the Act, or give rise to any legal damage.

(c) All reported court decisions declare and sustain the proposition that a regulatory tribunal, exercising functions similar to those of the Interstate Commerce Commission, cannot award reparation for the charging of rates which such tribunal has itself prescribed or approved. There is no reported decision holding to the contrary.

III. If the Act were so construed as to confer upon the Commission jurisdiction to award reparation under the circumstances here presented, it would to that extent be unconstitutional and void, in contravention of the due-process clause of the Fifth Amendment.

(a) The Commission, in awarding reparation, exercises quasi-judicial power as an agency of the judicial arm and not of the Congress; and in so doing, it can act only with reference to the law and the facts as they existed at the time the asserted right to damage arose.

(b) The due process clause of the Fifth Amendment prohibits any action on the part of the Commission the effect of which would be to divest respondents of property theretofore properly acquired in direct conformity with the Com-

mission's own prior valid legislative pronouncement.

IV. Further reply to arguments advanced by petitioner and others supporting petitioner's contentions.

Argument.

I.

THE RATES ASSESSED, AND THE CHARGES COLLECTED, UPON PETITIONER'S SHIPMENTS, WERE CONCLUSIVELY ESTABLISHED AS JUST AND REASONABLE, AND IN CONFORMITY WITH THE REQUIREMENTS OF THE INTERSTATE COMMERCE ACT AND OF THE COMMISSION'S VALID FINDINGS AND VALID CONTINUING ORDER.

(a) The Commission's findings and order in the First Case were continuously in effect without modification throughout the period of movement of petitioner's shipments, and were fully and literally complied with by the respondents.

It is important, at the very outset of this argument, to make it quite clear that the Commission's findings and order in the *First Case* were continuously in effect, without modification, throughout the entire period of movement of the shipments upon which reparation is sought by petitioner; and that the rates and charges assessed and applied upon those shipments by the respondents were established and maintained in full and literal compliance with the Commission's order.

The Commission rendered its opinion and order in the *First Case* on June 22, 1921 (R. 263-275). In

the order the Commission, after *reciting that a full investigation of the matters and things involved had been had* (R. 274), by appropriate language required the defendants to cease and desist from charging the rates then in effect on sugar from California points to Phoenix, and to establish, on or before September 17, 1921, and thereafter to maintain and apply, to the transportation of sugar, in carloads, from and to the points named, rates which should not exceed 96½ cents. It was further specifically provided that the order should continue in force *"until the further order of the Commission"*. It is not disputed that the making of a continuing order of this kind is within the powers conferred upon the Commission, particularly by Section 15 (2) of the Interstate Commerce Act (49 U. S. C. 15-2).

The order, by its terms, only required the carriers to establish rates "which should not exceed" the definite figure named by the Commission. It seems quite clear (and indeed, our opponents apparently agree: e. g., Petitioner's Brief, p. 14) that any rate which the carriers might establish, not exceeding the maximum thus set, was within the terms of the order, and constituted full and complete compliance therewith.

The respondents did not take full advantage of the maximum rate authorized by the Commission. Instead they established, on September 17, 1921 (the effective date of the order) a rate of 96 cents; and thereafter voluntarily reduced that rate twice: first, to

86½ cents (July 1, 1922) and subsequently to 84 cents (effective January 10, 1924). During this entire time the Commission's order of June 22, 1921, remained in full force and effect, without modification. The petitioner's shipments moved during the period between February 21st, 1923, and February 10, 1925, and were assessed charges based on the rates of 86½ cents and 84 cents successively in effect during that time.

The correctness of the above proposition is in effect conceded by our opponents, either expressly, or by failure to assert the contrary. In petitioner's brief it is said (at p. 14):

> "Such voluntary reductions were not at variance with the Commission's order."

In the brief for the Arizona Corporation Commission, which has been adopted by the National Association of Railroad, etc., Commissioners, it is said (at p. 6):

> "The issue * * * is whether rates exacted by a carrier which conform to a tariff not violative of an outstanding order of the Interstate Commerce Commission * * * are conclusively presumed to be lawful."

In the brief for the Interstate Commerce Commission, the following appears (at pp. 2, 3):

> "The question * * * is whether the Commission has power * * * to award reparation on shipments made on rates exacted by carriers subject to the Interstate Commerce Act, which were established pursuant to an order of the Commission fixing reasonable rates. * * *

> "In compliance with that order the carriers established a rate of 96 cents * * *."

In the brief tendered by Felix T. Smith and others as *amici curiae*, it is said (at p. 4):

> "* * * It appears that such rates are equal to or lower than rates prescribed by the Commission's order in a prior proceeding."

In spite of these admissions the Interstate Commerce Commission (at pp. 22-24 of its brief) offers the somewhat hesitant and apologetic suggestion that "it may well be argued that the rates involved were not Commission-made". The purpose of this suggestion is obscure, for the Commission does not undertake to define what it understands by the term "Commission-made". It may be noted that none of our other opponents advances any similar suggestion. Possibly the Commission intends to convey the impression that the rates as published and applied, having (as our opponents all admit) been voluntarily reduced by the carriers below the reasonable maximum prescribed by the outstanding and continuing order in the *First Case*, were no longer responsive to or in compliance with the terms of the order; that they were "carrier-made," and therefore no longer carried the Commission's contemporaneous sanction and approval. If such be the Commission's purpose, the suggestion conflicts directly with its own admissions, above-quoted, and with the position adopted by all our other opponents as well, to the effect that the carriers *complied*

with the order in the *First Case* as long as it continued effective.

In the very nature of things, the voluntary publication of rates less than the reasonable maximum fixed by the Commission must have resulted in rates just as properly to be termed "Commission-made", as the exact rate named in the Commission's findings and order. It is conceded that the order fixed only a reasonable maximum rate, and not the exact or only rate thereafter to be charged. Admittedly, the carriers did exactly as they were directed. Since the greater includes the less, it follows that the resulting rates were just as completely within the terms of the Commission's order, and thus just as much "Commission-made", as if the 96½-cent rate and no other had been published.

Reference is made by the Commission to the recent decision of the Circuit Court of Appeals for the Fifth Circuit in:

Eagle Cotton Oil Co. v. Southern Ry. Co., 51 Fed. (2d) 443,

to support its suggestion. While we do not agree with the conclusions of the Circuit Court in that, nevertheless the most superficial study of that decision will disclose that it is not in point upon the issue here discussed, and does not sustain the Commission's position at all. In the *Eagle Case*, as the opinion shows, a preliminary question was whether a rate approved (but not prescribed) by the Commis-

sion in 1915 retained its Commission-made status in 1925, after having been modified several times during the intervening period. The rate originally approved by the Commission in 1915 was $1.20 per ton. In 1917 that rate was advanced to $1.30, pursuant to general authority of the Commission. In 1918 it became $1.80, in response to a general order of the Director General of Railroads, then in charge of all carrier properties. In 1920 it was advanced to $2.25, pursuant to general authority given by the Commission in:

Increased Rates 1920, 58 I. C. C. 220.

In 1922 it was voluntarily reduced to $2.03, in line with the recommendations made by the Commission in:

Reduced Rates 1922, 68 I. C. C. 676.

The court, after taking into consideration the intervening advances, as well as the fact that in 1915 an affirmative order of the Commission issued pursuant to Section 15 could have an effective life of no more than two years, held that the $2.03 rate, the evolution of the $1.20 rate originally approved, was not a Commission-made rate, as applied to shipments moving in 1925.

The distinction between those facts and the facts involved in the instant case is apparent. In the case at bar, the Commission's order was issued in 1921, under the amended statute which provides that such an order is to have continuing effect until thereafter changed. It prescribed a rate of 96½ cents. That rate was never advanced. The 96-cent rate published

in compliance with the order was twice successively reduced, by *voluntary* action of the carriers; but at no time was there any rate published in excess of the maximum reasonable rate fixed by the Commission, nor was there any attempt to take advantage of any general order, authorizing increases in all rates; for no such order was made by the Commission during the period involved.

(b) The findings and order in the First Case, whereby the rate to be observed in future was determined, were made by the Commission in the exercise of its quasi-legislative power.

It has often been said that when the Commission undertakes, by means of formal findings and orders, to determine and establish rates to be observed for the future, it is acting in a quasi-legislative capacity; that is to say, it exercises a function which resides in the legislature, and has been delegated by the latter to the Commission. In:

Prentis v. Atlantic Coast Line R. Co. (1908), 211 U. S. 210,

this court said (at p. 226):

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. *Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule,* to be applied thereafter to all or some part of those subject to its power. *The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind,* * * *." (Emphasis ours.)

In:

Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1,

this court said (at p. 8):

> "Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

In:

Louisville & Nashville R. Co. v. Garrett (1913), 231 U. S. 298,

this court said (at p. 305):

> "It has frequently been pointed out that prescribing rates for the future is an act legislative and not judicial in kind (citing cases). It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body."

To the same effect see also:

Baer Brothers v. D. & R. G. R. Co. (1914), 233 U. S. 479, 486;

G. N. R. Co. v. Merchants Elevator Co. (1922), 259 U. S. 285, 291.

In the *First Case,* the Commission was unquestionably exercising this quasi-legislative power, for it undertook to establish the level of the rates to be observed by the respondent carriers from and after the effective date of the order. Its findings and order constituted a declaration by the Commission, made in the same manner as if Congress itself had spoken, that the just and reasonable rate thereafter to be observed as a maximum, for the transportation service considered, should not exceed 96½ cents, which rate, under the terms of the Commission's quasi-legislative enactment, thereby became the legal measure of the just, reasonable and lawful rate to be thereafter applied as long as the order continued in effect.

(c) The Commission by its findings and order in the First Case, prescribed the maximum just and reasonable rate thereafter to be maintained, until its further order.

It is contended and indeed vigorously asserted, by petitioner (Brief, pp. 12-14, 21-22), that the Commission, when it ordered the carriers not to exceed a rate of 96½ cents, did not thereby establish that 96½-cent rate as a *reasonable* rate, or declare what the reasonable rate in the premises should be (i. e., a rate conforming to the requirements of Section 1 (4, 5) of the Act); that it was undertaking only to prescribe a *maximum* rate (and not a reasonable rate). From this premise it is argued that since Section 1 of the Act requires that all rates and charges of common carriers shall be just and reasonable, a continuing duty is laid upon carriers to see

that their charges meet that requirement, which duty is not discharged by the publication and assessment of a rate equal to or less than that which the Commission itself has prescribed as a maximum, unless the rate thus published is also reasonable "in fact" as determined by subsequent judgment of the Commission; that if a published rate is not reasonable "in fact", it is unlawful and in violation of the Act, though equal to or even substantially less than the rate prescribed, approved and authorized, by a formal decision of the Commission, and that the carrier is therefore liable in damages for its assessment. Indeed, this contention is the very essence of the petitioner's case; for apparently it concedes that a carrier's compliance with a continuing formal order of the Commission prescribing a *reasonable* rate, as distinguished from a maximum rate (if any such distinction can exist) constitutes a full discharge of its duty to maintain and apply a just and reasonable rate and/or charge for the service considered, and renders it immune to any attempt to reduce that rate retroactively by an award of reparation, as for an asserted violation of the statute.

It may be observed that the Interstate Commerce Commission, appearing here as *amicus curiae*, does not agree with petitioner in this particular. The Commission apparently agrees, as perforce it must in view of expressions appearing in its opinions in the *First* and *Third Cases*, that its action in the *First Case* constituted, both in fact and in intent, the prescription of

a *reasonable* maximum rate for the future (Brief for I. C. C., p. 2).

It is our position that the Commission's findings and order in the *First Case* must necessarily be regarded as having prescribed, not merely a maximum rate, but the *reasonable* maximum rate which the carriers concerned could thereafter charge, as long as the findings and order continued effective, for the following reasons:

(1) The primary issue presented to, and necessarily decided by, the Commission, in the *First Case,* was whether the rate then in effect was reasonable;

(2) The Commission has no power to prescribe a maximum rate which is other than just and reasonable;

(3) Orders of the Commission, precisely similar in every essential respect to the order in the *First Case,* have been held by this court and the inferior federal courts to be orders prescribing reasonable rates;

(4) Both in the *First Case* itself, and subsequently, the Commission has indicated that it regarded its action therein as the prescription of a reasonable rate; and

(5) The essential language of the finding in the *First Case* is substantially the same as that used in the *Third Case;* if the latter is construed as a finding of reasonableness, the former must be similarly construed.

(1) *The primary issue presented to, and necessarily decided by, the Commission in the First Case, was whether the rate then in effect was reasonable.*

The statement of the issues appearing in the body of the Commission's report in the *First Case* specifies that the important issue presented to it was whether the existing rate was reasonable (R., 264). Under Section 13(1) of the Act (49 U. S. C. A., 13(1)) it was the Commission's duty, upon a complaint presenting such an issue, to enter into an investigation and to make a decision thereon. It has been specifically held that the Commission, when complaint is made to it, must make a determination in response to the issues thereby raised.

A. T. & S. F. Ry. Co., et al. v. U. S. (1914), 232 U. S. 199, 221; 58 L. ed. 568, 577,

"What is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice, or rendering other transportation services, are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots; it may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. It may prescribe the form in which schedules shall be prepared and arranged (Section 6), and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a

through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. *All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices.*" (Emphasis ours.)

It cannot be assumed that the Commission failed in the duty thus directly laid upon it. It is not alleged, has never been asserted, and the trial court has not found, that the Commission failed to perform its statutory duty in the premises. No question has ever been raised as to the *validity* of the decision in the *First Case*. It has stood unchallenged in that respect, and its correctness from the legal standpoint must be conceded. It follows then that the necessary legal effect of the Commission's decision must have been the determination, not merely of a maximum rate, but of a *reasonable* rate, for the future; and that the Commission's order, issued concurrently with and as part of the final disposition of the proceeding, was an order fixing a *reasonable* rate, as defined by Section 1 (4, 5) of the Act.

(2) *The Commission has no power to prescribe a maximum rate which is other than just and reasonable.*

Petitioner's argument carries the essential implication that the Commission is empowered by law to prescribe and authorize a maximum rate, which is nevertheless unlawful, i. e., unreasonable; that in ren-

dering its decision in the *First Case* it undertook to perform that unlawful act. That contention is squarely opposed to ordinary reason and logic; moreover, it is specifically disposed of, by a number of decisions of this court, which definitely establish that the Commission has no power to prescribe other than just, reasonable, and lawful rates; that when it acts within the scope of its powers, and renders valid findings and a valid order, the rates resulting therefrom are conclusively established as just, lawful and reasonable. A leading case which declares that the Commission has no power to prescribe other than a just and reasonable rate is:

S. P. Co. v. I. C. C. (1911), 219 U. S. 433,

in which this court said (at pp. 443, 444):

> "The insistence is that both in form and in substance the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently

that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered.

* * * * * * *

"Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

Other cases to the same effect include:

I. C. C. v. U. S. (1912), 224 U. S. 474; 56 L. ed. 849;

I. C. C. v. Diffenbaugh (1911), 222 U. S. 42, 47; 56 L. ed. 83;

United States v. N. Y. C. R. Co. (1924), 263 U. S. 603, 610; 68 L. ed. 470;

Ann Arbor R. R. Co. v. U. S. (1930), 281 U. S. 658, 668; 74 L. ed. 1098;

Brimstone R. & C. Co. v. U. S. (1927), 276 U. S. 104, 109;

A. C. & Y. Ry. Co. v. U. S. (1927), 22 Fed. (2d) 199, 203;

Anchor Coal Co. v. U. S. (1927), 25 Fed. (2d) 462.

Petitioner nevertheless insists (Brief, pp. 12-14) that Section 15(1) of the Act is to be interpreted as authorizing the Commission to prescribe a maximum rate which may lawfully exceed the absolute level of a just and reasonable rate. Under Section 15, as enacted in 1906 (34 Stat. 589), and subsequently amended by slight additions in 1910 (36 Stat. 551), the Commission was authorized and empowered and charged with the duty, whenever upon complaint it should be of opinion that a rate was or would be unreasonable, "to determine and prescribe what will be the just and reasonable rate or rates, or charges, to be thereafter observed in such case as the maximum to be charged", and to order the carriers to cease and desist from the violation, and thereafter to refrain from publishing or receiving any rate in excess of the maximum prescribed by the Commission. Under that statute, the Commission could obviously prescribe only a reasonable maximum rate; it could not prescribe a maximum rate which was other than reasonable. Under the statute as it now reads, as amended by the Transportation Act of 1920 (41 Stat. 484), the Commission is authorized to prescribe the just and reasonable rate, or the maximum, or minimum, or maximum and minimum, to be charged. In other words, the Commission, in addition to having the power which it previously possessed, to prescribe a maximum reasonable rate, may now prescribe the minimum rate, or the exact rate, to be charged. But the amendment nowhere contains any language authorizing the Commission to prescribe a maximum rate which will exceed

an inherently just and reasonable charge for the service in question. The whole text of the paragraph, and its entirely legislative history, show that the Commission's power to prescribe the exact rate, or the maximum, or minimum, which was conferred by the 1920 amendment, was given in order to make certain that all charges should be just and reasonable to carrier and shipper alike, and that undue prejudice and discrimination might be prevented, and ruinous rate-wars avoided. Compare:

McVeagh on the Transportation Act of 1920, pp. 356-358;

Congressional Record, Vol. 58, pp. 8309-8318.

Any rate which the Commission fixes must comply with the provisions of Section 1(5) of the Act, which requires that *all* rates, etc., be just and reasonable, and makes no distinction between a rate or charge initiated by a carrier and one prescribed by the Commission. Decisions of this court, rendered since 1920, and reviewing the Act as it now exists, uphold the principle that although the Commission's power has been enlarged to the extent indicated, it has not been authorized to prescribe rates which do not meet the essential requirement of the Act that they be just and reasonable. In

Brimstone R. & C. Co. v. U. S., supra,

this court said (276 U. S., at p. 109):

"Section 15(1) empowers the Commission whenever, after full hearing it shall find any rate charged by a carrier is or will be unjust or unreasonable or unjustly discriminatory or unduly

preferential or prejudicial or otherwise in violation of this Act, *to determine and prescribe the just and reasonable rate thereafter to be observed* and to make an order requiring the carrier to cease and desist from such violation." (Italics ours.)

In:

U. S. v. N. Y. C. R. Co., supra, and
Ann Arbor R. Co. v. U. S., supra,

this court again indicated that Section 15(1) is to be read in conjunction with Section 1(5), and the Act is not to be construed as authorizing the Commission to prescribe rates which are not reasonable, and in conformity with the applicable sections of the statute.

Moreover, as we shall show in the next succeeding subdivision of this discussion, orders of the Commission, issued since 1920, pursuant to the authority conferred by Section 15(1) as it now reads, have been construed by this court and by inferior federal courts as orders prescribing maximum reasonable rates, no distinction being made between a maximum rate, on the one hand, and a reasonable rate, on the other. In their essential phraseology those orders were precisely identical with the order in the *First Case*.

It is quite illogical to argue that the power conferred upon the Commission by Section 15(1), the express and essential purpose of which is to enable the Commission to correct proven violations of Section 1, actually permits that end to be accomplished by an

unlawful act; namely, the authorization or prescription of a so-called maximum rate which in actual fact is unreasonably high. The order in the *First Case* was issued following a "full investigation," and based upon ample evidence (R. 274-275). It was indisputably valid. It resulted in the determination of a rate which, in legal contemplation, could not have been other than just, reasonable and lawful, and in full conformity with the requirements of Section 1(5) of the Act.

(3) *Orders of the Commission precisely similar in every essential respect to the order in the First Case have been held by this court and the inferior federal courts to be orders prescribing reasonable rates.*

Our contention that the order in the *First Case* should be construed as an order prescribing a reasonable rate is supported by a number of court decisions in which orders of the Commission, issued under authority conferred by the Act as it now reads, have been construed as orders prescribing reasonable rates. In all essential respects these orders of the Commission were of precisely the same character as the order in the *First Case*. In:

C. R. I. & P. Ry. Co. v. U. S. (1927), 274 U. S. 29,

this court affirmed a decision of the United States District Court for the Northern District of Texas, re-

ported 6 Fed. (2d) 888, in which was involved the validity of an order issued by the Commission in conjunction with its decisions in:

Houston Cotton Exchange v. A. & A. R. R. Corp., 87 I. C. C. 392; 93 I. C. C. 268.

The Commission's findings in these cases were substantially similar, in their essential phraseology, to the finding in the *First Case* (R. 273). In its opinion this court summarized the Commission's final order in the following language:

> "The modified final order of the Commission required appellants to establish and maintain for the transportation of cotton from Oklahoma points * * * to destinations in New England territory, joint rail and water rates not exceeding 'rates 4 cents per 100 pounds lower than the present all-rail rates from and to the same points.' * * * The Commission found that the establishment of joint rail and water rates on cotton between the points in question was desirable in the public interest, and that the existing rates for such transportation were unreasonable to the extent that they exceeded or may exceed rates constructed by the deduction of 4 cents from the present all-rail rates."

The court treated this order as one prescribing *reasonable* rates for the future, saying:

> *"The complaint before the commission plainly sought the establishment of reasonable rates,* and the order of the commission directed the carriers

to discontinue the then existing rates made up of combinations of local rates and substitute the maximum joint rates which were prescribed in the words already stated. *The commission found that rates were and would be unreasonable to the extent they exceeded or might exceed those prescribed.* In form, *the action of the commission was responsive to the case made by the complainant,* and to hold that, in fact, its order was not one fixing reasonable rates but an order equalizing rates would be to put undue stress upon certain recitals contained in the report, to which our attention is called but which need not be detailed. If these recitals stood alone, they might give plausibility to the contention; but from a consideration of the entire record we think it quite unfair to conclude that the commission undertook to exercise an authority entirely different and distinct from that which the complaint specifically invoked.

* * * * * * * *

"Here, it is true, the order fixes the rail-and-water rate by relating it in terms to the all-rail rate; but, *since we accept the view that the former was, in fact, established as a just and reasonable rate,* there can be no objection to the form of words adopted as a method of short and convenient description of that rate." (Emphasis ours.)

We call particular attention to the concluding portion of this quotation, in which this court indicated its acceptance of the view that the rates established by the

Commission were prescribed *as just and reasonable rates.* In:

Montrose Oil Refining Co. v. St. Louis-San Francisco Ry. Co., et al. (1927), 25 Fed. (2d) 750,

the United States District Court for the Northern District of Texas reviewed findings and orders made by the Commission in a proceeding of the same title:

78 I. C. C. 572; 95 I. C. C. 96.

After referring to the specific findings and order made by the Commission, the court reached conclusions similar to those reached by this court in its decision last above cited, observing that the Commission's order, naming a figure which the carriers were directed not to exceed for the future, was an order fixing a reasonable rate. The judgment was affirmed and the District Court's opinion adopted by the Circuit Court of Appeals for the Fifth Circuit:

St. Louis-San Francisco Ry. Co. v. Montrose Oil Refining Co. (1927), 25 Fed. (2d) 755.

In:

Mellon v. World Publishing Co. (1927), 20 Fed. (2d) 613,

the Circuit Court of Appeals for the Eighth Circuit expressed substantially similar views, upon consideration of the Commission's decision and order in:

World Publishing Co. v. Director General (1919), 53 I. C. C. 491.

No essential distinction can be observed between the Commission's order in the *First Case*, by which the maximum reasonable future rate from California points to Phoenix was prescribed, and the orders fixing future rates, under review in the cited cases. These decisions are squarely in point, and establish that an order of the Commission directing carriers subject to its jurisdiction to establish, and maintain for the future, a rate not exceeding a named and ascertainable figure is, from the legal standpoint, an order fixing the figure named as the maximum reasonable rate thereafter to be applied.

(4) *Both in the First Case itself, and subsequently, the Commission indicated that it regarded its action therein as the prescription of a reasonable rate.*

The Commission itself, in its opinions both in the *First Case*, and the more recent cases in which it has reviewed that decision, has characterized the rate which it there prescribed as a *reasonable* rate. The very text of the opinion in the *First Case* indicates that the Commission regarded the rate as having been fixed at a reasonable figure. For example, the headnote to the Commission's report reads in part as follows (R. 263):

> "Rates on sugar in carloads from California points to Phoenix, Arizona, found unreasonable. *Reasonable rate prescribed for the future.*" (Emphasis ours.)

That reasonable rate was, of course, the 96½-cent rate referred to in the opinion, and specifically named as the maximum reasonable future rate in the order. In the opinion itself the Commission said (R. 273):

> "We find that the rates attacked were, are, and for the future will be unreasonable *to the extent that they exceeded; exceed, or may exceed 96.5 cents.* There is no evidence of record that complainants made shipments of sugar from California points to Phoenix, and paid and bore charges thereon at rates higher *than those herein found reasonable.*" (Italics ours.)

The decision in the *Second Case* (95 I. C. C. 244; R. 276-290) was a decision of the entire Commission, four Commissioners dissenting. The separate dissenting opinion of Commissioner Hall (95 I. C. C., pp. 248-250; R. 285-288) concurred in by Commissioners Atchison, Esch and Lewis, refers to the 96-cent rate, voluntarily established by the carriers following the decision in the *First Case,* as a reasonable rate, which was subjected to the two subsequent voluntary reductions previously noted (R. 257, 258). Commissioner Hall says that "all of these (voluntary rates) were lower than what we had found *reasonable* and prescribed" in the *First Case;* and further:

> "And yet they (the majority) find unreasonable rates lower than the rates prescribed in the (first) case and award reparation to a level 17.5 cents lower than *that found reasonable.*"

The decision in the *First Case* was further reviewed in the *Third Case,* and the Commission there said (140 I. C. C. 171, 179, 180; R. 306-307):

> "Defendants call attention to the fact that in our original report in No. 14449 we awarded reparation on shipments which moved to Phoenix on a rate 0.5 cents less than *the rate prescribed as reasonable by us from and to the same points in Phoenix Chamber of Commerce v. Director General,* supra, referred to as the First Phoenix Case. * * * Upon this record we reach the conclusion that *the rate prescribed in the First Phoenix Case,* during the period embraced in these complaints, is unreasonable and that a lower rate would have been reasonable during that period." (Emphasis supplied.)

These references demonstrate that both in 1921, when the *First Case* was decided, and likwise in 1925 and 1928, when that decision was reviewed, the Commission considered that in ordering the carriers to establish for the future rates not exceeding 96½ cents, it had, both in fact and in legal contemplation, prescribed that figure as a just and reasonable maximum rate.

(5) *The essential language of the finding in the First Case is substantially the same as that used in the Third Case; if the latter is construed as a finding of reasonableness, the former must be similarly construed.*

It should be particularly noted that the Commission, in making the findings in the *Third Case* upon

which the reparation order in suit is based, employed language exactly corresponding to that which was used in its prior finding in the *First Case.* Thus, in the *First Case,* the Commission's finding respecting the proper level of the rate to be observed, both for the past *and for the future,* reads as follows (R. 273):

> "We find that the rates attacked were, are *and for the future* will be unreasonable to the extent that they exceeded, exceed, or may exceed 96.5 cents." (Italics ours.)

In the *Third Case,* its findings respecting the past and future levels of the rates under attack were as follows (R. 307, 308):

> "We further find that the assailed rates, minimum 60,000 pounds, from California points were, are, and will be unreasonable to the extent that they exceeded, exceed or may exceed respectively the following in cents per hundred pounds:" (here follows a specific statement of rates to various Arizona points).

In similar manner, the *order* made by the Commission in the *Third Case,* prescribing the reasonable rates to be observed for the future (R. 314, 315) employs precisely the same phraseology, dates and amounts only being changed, as that employed in the corresponding portions of the order in the *First Case* (R. 275).

The petitioner's asserted right to reparation depends entirely upon the finding, in the *Third Case,*

to the effect that the assailed rates to Phoenix had been unreasonable in the past, to the extent that they exceeded the amounts named in the opinion. In order to maintain its suit at all, petitioner must, and does, insist that that finding is a finding of "reasonableness", within the meaning of Section 1(5) of the Act. Unless the finding is thus interpreted, the order for the payment of reparation, upon which petitioner must rely, has no basis whatsoever and is void. But if that interpretation is accorded the finding in the *Third Case,* no different construction can consistently be given the precisely similar finding in the *First Case;* for it is phrased in language essentially identical with that employed in the *Third Case.* If the finding in the *Third Case* constituted a finding of reasonableness, upon which a reparation order might be predicated, then the finding in the *First Case* was equally a finding of reasonableness; and the rates subsequently published and assessed by the defendants, which were in full conformity with that finding and with the order based thereon, were conclusively established as just and reasonable.

It has been asserted, however, that these two findings cannot be compared, because the finding in the *First Case* was made by the Commission in its legislative capacity, whereas the finding in the *Third Case* was quasi-judicial in character. That argument is without merit. The two findings, whether they related to the reasonableness of rates for the future or the past, were of similar character in that the Com-

mission, acting as a tribunal created by law and informed by experience, was undertaking to determine whether a rate complained of was in fact just and reasonable.

Compare this court's opinion in:

Mitchell Coal Co. v. Pa. R. R. Co. (1913), 230 U. S. 247,

in which it was said (at p. 258):

"Such orders so far as they are administrative are conclusive whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. *They are quasi-judicial and only prima facie correct insofar as they determine the fact and amount of damage* * * *. In considering *the administrative question as to reasonableness, the elements of the problem are the same whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion,* and the same necessity for having the matter settled by a single tribunal. * * * Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission, the carrier and shipper are alike bound to treat them as lawful. *After the rate had been abandoned the carrier is still obliged to treat it as having been lawful, and cannot refund what had been collected under it until the*

Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate past or present which the statute had declared should be deemed lawful until it had been held to be otherwise by the Commission.

As to past and present practices or allowances, the Commission has the same power and there is the same necessity to take preliminary action." (Emphasis ours.)

To the same effect, see the opinion of this court, in:

Great Northern Ry. Co. v. Merchants Elevator Co., supra (259 U. S., at p. 291).

Compare, also:

New York Central R. Co. v. N. Y. & P. Co. (1926), 271 U. S. 124.

Although one of the findings here contrasted was made as the prerequisite to an award of reparation, and the other as the necessary preliminary to the fixing of a future rate, both were made as determinations of the question of fact, which the Commission alone can determine, whether the particular rates complained of were just and reasonable. The essential similarity of the findings is not destroyed; and the conclusion is inevitable, that if one is interpreted as a finding of reasonableness, the other must also be.

(d) Having been validly made, and in full force and effect at the time petitioner's shipments moved, the findings and order in the First Case constituted a conclusive determination that the rates established and charged in compliance therewith were just and reasonable.

It is shown (indeed, it is not disputed) that the rates applied upon petitioner's shipments were published and maintained in strict and literal conformity with the findings and the continuing order in the *First Case*. We have demonstrated that by that decision and order the Commission, in legal effect, fixed and prescribed the maximum reasonable future rate thereafter to be applied, until its further order. These two premises having been established, it necessarily and logically follows that the rates thus published by respondents, and applied to petitioner's shipments, were both in fact, and in legal contemplation, conclusively established as just and reasonable, and in conformity with the requirements of the Act; that the carriers' compliance with the order constituted a complete fulfillment of the obligation to maintain just and reasonable rates, imposed by Section 1 (4, 5) of the Act.

The question whether a rate is reasonable has been stated by this court to be a question of fact, to be determined by the Commission; and it has been invariably held that its determination must be treated as conclusive, and not subject to revision or correction by the courts, provided only that the findings are supported by substantial evidence, and the Commis-

sion has not exceeded constitutional or statutory restrictions, or committed any error of law. In:

I. C. C. v. U. P. R. R. Co. (1912), 222 U. S. 541,

this court said (at pp. 547, 548):

"* * * In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * *

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not be considered the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has as-

cribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In:

Western Paper Maker's Chemical Co. v. U. S. (1926), 271 U. S. 268,

this court said (at p. 271):

"The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive, if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law."

Other cases to the same effect include:

A. T. & S. F. Ry. Co. v. U. S. (1914), 234 U. S. 294, 311;

Virginian R. Co. v. U. S. (1926), 272 U. S. 658, 665;

Keogh v. C. & N. W. Ry. Co. (1921), 260 U. S. 156.

Our opponents do not assert that the decision and order in the *First Case* were not validly and properly made, in the regular pursuance of the jurisdiction conferred by the Act. Indeed, it has never been alleged, and is not now contended, that that decision was not valid and lawful in every respect. The Commission itself, in the course of the order in the *First Case*, recited (R. 274) that the case had been duly heard and submitted *and that full investigation of the matters and things involved had been had.* It follows that the rate prescribed in the *First Case* was, in the light of the authorities cited, conclusively established as just, reasonable and lawful, and that the rates published by the respondents, in compliance with and in obedience to that decision and order, were therefore conclusively established as just, reasonable and lawful, during the period of the approved continuance and operation of the order.

II.

THE INTERSTATE COMMERCE ACT DOES NOT CONFER JURISDICTION UPON THE COMMISSION TO AWARD REPARATION FOR THE CHARGING OF RATES MAINTAINED AND APPLIED IN CONFORMITY WITH THE COMMISSION'S VALID OUTSTANDING FINDINGS AND VALID CONTINUING FORMAL ORDER.

(a) The Act confers upon the Commission jurisdiction to award reparation (damages) only for violations of the Act by carriers.

The Commission's power to award reparation (damages) is specifically limited, by the very language of

the Act, to those cases where it appears that the person claiming damages has suffered injury through some violation of the Act, by a carrier subject thereto. Under Section 8 of the Act (49 U. S. C. A. 8) it is provided that in case any common carrier subject to the provisions of the Act shall do, or permit to be done, any acts, etc., prohibited or declared to be unlawful by the Act, or shall fail to perform any act required by the Act to be done, it shall be liable to the person or persons injured for the full amount of the damages sustained in consequence of such violation.

Section 9 of the Act (49 U. S. C. A. 9) provides that any person claiming to be damaged by any common carrier subject to the provisions of the Act may either make complaint to the Commission, or may bring suit for the recovery of the damages for which such common carrier may be liable under the Act, in a district court of the United States; providing further that the plaintiff shall not have the right to pursue both of such remedies, but must elect which of the two methods of procedure he will adopt.

Section 13 (1) (49 U. S. C. A. 13-1) provides that any person, etc., complaining of any act or omission on the part of a common carrier subject to the provisions of the Act, may make complaint to the Commission, and requires the Commission to receive such complaints and to undertake their investigation.

Under Section 16 (1) (49 U. S. C. A. 16-1) the Commission is empowered, if it shall determine, after

hearing held in accordance with the provisions of the preceding sections, that a complainant is entitled to an award of damages under the provisions of the Act *for a violation thereof*, to make an order directing the carrier to pay to the complainant the sum to which he is entitled.

Neither the Interstate Commerce Act, nor any other statute, provides that the Commission shall have power to entertain complaints or to award damages, except for violations of the Act. It has been repeatedly held that the Commission's power in this respect can be exercised only when a violation of the Act has taken place; that the only legal damage of which the Commission may take cognizance is that due to an infraction of the Act.

News Syndicate Co. v. N. Y. C. R. Co. (1927), 275 U. S. 179, 187; 72 L. ed. 225;

"The Commission had jurisdiction to determine whether plaintiff in error was entitled to 'an award of damages under the provision of this Act *for a violation thereof*'."

See, also:

New Pittsburgh Coal Co. v. H. V. Ry. Co. (1913), 26 I. C. C. 121, 126;

Pitwood v. N. P. Ry. Co. (1918), 51 I. C. C. 535.

(b) The Commission's determination in the First Case having been conclusive, respondents' compliance therewith completely fulfilled their obligation to maintain and apply reasonable rates upon petitioner's shipments. Their obedience to the Commission's findings and order could not, in legal contemplation, have been a violation of the Act, or give rise to any legal damage.

The reparation order upon which the petitioner's suit is based depends upon a finding made by the Commission in the *Third Case* (R., 307, 308) that the rates assessed and the charges collected upon its shipments, although published and applied in conformity with the Commission's outstanding valid formal findings and order in the *First Case,* were in reality unjust and unreasonable, and in violation of the requirements of Section 1 of the Act. In other words, the award rests upon a finding that respondents violated the law, and caused petitioner to be damaged, by assessing rates which were in strict conformity with, and in fact less than, the reasonable maximum rate which the Commission had authorized and prescribed by its direct affirmative findings and order in the *First Case.* This court is thus confronted with the astounding proposition that respondents can be declared to have violated the Act, and compelled to respond in damages therefor, although they have done the very thing which the Act itself, and the outstanding valid formal order of the Commission, authorized and required.

We may emphasize again that when the Commission in a formal proceeding reaches a determination

respecting the reasonableness of a particular rate and either approves the rate under review or prescribes for the future either the maximum, or minimum, or maximum and minimum rate to be thereafter observed, its determination is conclusive. The rate thus prescribed (or approved) is conclusively established as just, reasonable and lawful, by authority of the only tribunal having jurisdiction to decide the question of fact involved in the determination of what is a just and reasonable rate. There is only one final test of the reasonableness of a rate applying to interstate commerce, and that is an investigation, and the expression of an informed judgment thereon by the Commission. The decisions of this court above cited demonstrate that when such a determination is made by the Commission in the exercise of its lawful jurisdiction, it is final and conclusive. The rate approved or prescribed by the Commission is thereby determined for all purposes as a just and reasonable rate, provided only that the Commission acts within the scope of its powers, and does not proceed arbitrarily or unjustly, or without evidence to support its conclusions.

In view of the conclusive character of a valid determination made by the Commission, it would seem that the very statement of the proposition advanced by the petitioner and those who support its contentions is sufficient to condemn it absolutely. It will be borne in mind, and indeed our opponents concede, that carriers

are required to comply with affirmative orders of the Commission prescribing rates for the future. The fact is that a carrier's deliberate failure to comply with a formal order fixing a rate thereafter to be observed is, under the provisions of Section 16(7, 8) of the Act (49 U. S. C. 16 (7, 8); 41 Stat. 492) subject to heavy penalties. To construe the Act as empowering the Commission to declare, in a subsequent collateral proceeding, that a rate which it has previously examined and declared to be reasonable, and ordered observed as a maximum in the future, was "in fact" unreasonable, and that rates less than that maximum, voluntarily established and maintained in compliance with the order, were also unreasonable, would be to adopt and endorse the anomalous and extraordinary proposition that carriers can be declared to have violated the Act, and compelled to respond in damages therefor, although they have done the very thing which the law and the order of the Commission authorized, and indeed required them to do in order to escape severe penalties. The very statement of that proposition demonstrates its essential injustice and impropriety. It would be nothing less than a paradox —an utter monstrosity—for Congress to have conferred power upon the Commission to substitute its judgment for that of the carriers and to prescribe, with conclusive effect, the levels of rates for the future; and with the same enactment to provide that shippers might recover damages in subsequent collateral proceedings before the Commission, resulting in

orders enforcible in the courts, upon the theory that in complying with the conclusive orders of the Commission the carriers had nevertheless violated the statute which the Commission administers. The theory advanced by the petitioner and those who support its views is odious to every accepted standard of justice and fair dealing.

Our opponents nevertheless insist that there is a continuing duty, placed upon carriers by the Act, to see that their rates are at all times just and reasonable; and that this duty is not discharged by the publication and maintenance of rates which conform to a conclusive and continuing determination, previously made by the Commission, and endowed by law and by its own terms with continuing force and effect until thereafter changed. This contention absolutely loses sight of the fact that the determination of a reasonable rate for a particular service, when properly and validly made by the Commission, is conclusive upon the carriers, and cannot be disregarded by them. It is quite correct that the Act requires (Section 1, (4, 5)) that all rates be just and reasonable; but it also empowers the Commission to determine finally whether a particular rate conforms to that standard and if not, to say "what will be the just and reasonable * * * rate to be thereafter observed."

As this court has many times stated, the Commission, when it prescribes a rate "to be thereafter observed" and maintained, acts in its legislative capacity. It establishes, in the same manner as if the

Congress itself had enacted a specific statute, what the reasonable and lawful rate in the premises will be. The carriers' compliance with that legislative determination cannot be in violation of the law: by its very terms, it cannot be other than a direct compliance with the statutory requirements.

Our opponents urge, however (Petitioner's Brief, p. 39; Brief for I. C. C., pp. 10-18), that even though the Commission may have taken affirmative action to prescribe a particular rate as reasonable, it is the duty of the carriers to take into account changes of conditions which may subsequently occur and to revise their rates accordingly, and that this duty persists irrespective of the continuing effect given by the statute to the Commission's legislative orders. This contention ignores the fact that the Commission's determination of the reasonableness of a particular rate, if validly made, is absolutely conclusive. By the terms of the statute it fixes the rate "to be thereafter observed" as long as its order is effective. If our opponent's argument were sound, the carriers would equally be entitled, and even required if changed conditions warranted, to increase a rate prescribed by the Commission as a maximum reasonable rate, without any authority from the Commission. It is as reasonable to suppose that changed conditions would justify an increase of a particular rate as to assume that its reduction would be required. But of course the carriers have no such option. As long as an affirmative order continues in effect, it must be ob-

served; and the maximum therein prescribed will continue to represent the maximum which the carrier may charge, no matter how great an advance might be justified by changed conditions. Certainly if the carrier has no option to advance a rate, except by approval of the Commission, it should not be required, as an affirmative obligation imposed by Section 1 of the Act, voluntarily to reduce a rate below a standard set by the Commission "to be thereafter observed"; especially since that determination, insofar as the carrier is concerned, is final and conclusive.

It has several times been observed by this court that findings of fact as to the reasonableness or unreasonableness of a particular rate, under complaint for purposes of reparation, inure to the benefit, not merely of the particular shipper by whom the complaint is brought, but of all other shippers who have made shipments under the rate assailed and have paid and borne charges thereon. In

Phillips v. Grand Trunk W. Ry. Co. (1913), 236 U. S. 662,

this court said (at p. 665):

> "But the proceeding before the Commission, to determine the reasonableness of the two-cent advance, was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern, in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was

> general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate. * * * The plaintiff and every other shipper similarly situated was entitled by appropriate proceeding before the Commission or the courts to obtain the benefit of that general finding and order."

Compare also

> *Mitchell Coal Co. v. Pa. R. R. Co.*, supra (230 U. S. 247, 258),

(to which reference has already been made) in which this court said:

> "Such orders (of the Commission), so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order."

These decisions make it quite clear that findings of the Commission as to the reasonableness of a particular rate, when properly made as the foundation for awards of reparation, are conclusive and binding, not merely upon the shippers and carriers directly involved in the proceeding, but upon all shippers and carriers who may be affected by the ruling. Particularly, they establish that every shipper may, by appropriate proceedings, obtain the benefit of such findings, which constitute the conclusive meas-

ure of his rights and of the carrier's correlative obligation in the premises. But if such conclusive effect is given to rulings of the Commission as relating to past rates, equally its rulings as to rates to be observed for the future should be regarded as constituting the conclusive measure of the rights of the shippers, as long as those rulings continue in effect without modification, and as determining for their effective period the extent of the obligation imposed upon the carrier to maintain and charge just, reasonable and lawful rates.

Our opponents assert (Petitioner's Brief, pp. 47, 51) that the decision of the court below denying to the Commission jurisdiction in the premises rests upon no express provision of the Act, or of any amendment thereto; and contend that if the Commission has been deprived of jurisdiction, heretofore given by the Act, to award reparation for the collection of rates prescribed by the Commission, that deprivation must arise by implication from some amendment to the Act, for there has been no outright change such as to authorize the conclusion reached by the court below. That contention is quite erroneous. The decision of the court below rests upon the *express* provisions of the Act, which limit the Commission's jurisdiction to award reparation to those cases in which it is made to appear that the carrier has violated the terms of the statute, and has thereby caused damage to a shipper. The Act has never conferred upon the Commission jurisdiction to award reparation for a carrier's com-

pliance with and obedience to the statute. The carrier's obedience to a conclusive and continuing order prescribing the maximum reasonable rate thereafter to be charged, necessarily results in the maintenance and application of rates which, as measured by the only final standard which the law of the land recognizes, are just and reasonable. There can be no violation of the Act, under such circumstances; and consequently, there is nothing to which the Commission's jurisdiction to award reparation may attach.

Our opponents' basic contention is equivalent to the assertion that the carriers' obligation under Section 1 cannot be measured by the final and continuing conclusion reached by the Commission pursuant to the provisions of Section 15 (1), after full and complete investigation into the particular circumstances involved. In effect they say that the definite pronouncement of the Commission, the only body having power to make a final determination in the premises, cannot be accepted by the carriers as the definite guide to their duty. They advance this argument even though they admit that the Commission is vested with final authority, and that there is no appeal from its conclusions upon administrative questions, and matters of fact, except upon jurisdictional or constitutional grounds. Our opponents have not cited any decision sustaining this contention, or holding that a carrier's compliance with a definite binding conclusive order of the Commission does not discharge the obligation to charge reasonable rates, placed upon

it by the statute. We are confident that no such decision has ever been rendered. There are, however, numerous authorities which indicate a contrary view. The very recent decision of this court in:

Atlantic Coast Line R. R. Co. v. Powe (1931), 283 U. S. 401; 75 L. ed. 1142,

is particularly in point.

The case involved a suit for damages for the death of a railroad employe, brought under the provisions of the Federal Employer's Liability Act, the only negligence asserted being that a certain semaphore standard had been placed too near the railroad track. It appeared that the Railroad Commission of South Carolina, acting pursuant to lawful authority, had as a safety measure prescribed a general rule that semaphore standards and other similar structures should not be placed nearer than 4 feet from the outer edge of the rail. The semaphore in this instance was some 4 feet 10 inches distant from the top of the rail. This court said:

"It will be seen that the railroad company in this case more than complied with the order. It is true that four feet was a minimum distance, but it satisfied the requirement of the Commission, and *it would be going far to say that the railroad company was not warranted in supposing that it had done its duty so far as the Commission was concerned when it put the semaphore four feet and ten inches away.* * * * The question is not whether a reasonable insurance against such mis-

fortunes should be thrown upon the traveling public through the railroads, but whether the railroad is liable under the statute according to the principles of common law regarding the tort. No negligence is proved against the petitioner."

In the instant case it is undisputed that the respondents "more than complied" with the Commission's affirmative order. The 96½-cent rate was set as a reasonable maximum; and it is utterly illogical to say that the carriers (and this court) are not warranted in the conclusion that respondents fully discharged their duty under the Act, when they published and maintained rates which "more than" satisfied the Commission's requirements, in that they were actually lower than the reasonable maximum fixed by the Commission's continuing order.

The decision in

United States v. New River Co. (1924), 265 U. S. 533,

is likewise closely in point. The case involved a suit brought to enjoin certain carriers from applying a certain rule (Rule 4 of Circular CS-31, Revised) for the distribution of coal cars, and to set aside the Commission's decision and order in *Bell & Z. Coal Co. v. B. & O. S. W. R. Co.*, 74 I. C. C. 433.

In that proceeding the Commission made findings as follows:

"The present facts considered, we do not conclude upon these records that the rule attacked

rule 4 of Circular CS-31, Revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the *Fairmont cases*, based upon a mistaken adherence to and extension of the decision in the *Illinois case*, are reversed. The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require. The complaints herein will be dismissed, and we will enter an order to that effect." (74 I. C. C. 433, 443.)

The Commission thereupon made a formal order, reciting that it had "made and filed a report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part hereof. It is ordered that the complaints in these proceedings be and they are hereby dismissed". Following the report and order of dismissal, the defendant carriers gave notice that they would put rule 4 in effect. Thereupon suit was brought to enjoin the carriers from applying the rule and to set aside the decision and order of the Commission. The District Court held that the order of the Commission was in substance and effect affirmative, i. e., the same as if the order had been affirmative in form; but it also held that the rule was unlawful and issued an injunction, from which the United States and the Interstate Commerce Commission appealed. The carriers did not appeal. This court was called upon to decide whether the order of the Commission was subject to

review by the District Court; and if so, whether it should be set aside.

In holding that the order was subject to review, this court said (p. 541):

> "The Commission reversed its former findings and decided in favor of rule 4, and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. It is not merely negative. *Clearly, the order permits and authorizes the carriers to apply rule 4 * * *. Plainly it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150% rule.* The effect of the order is to grant the relief sought by the operators of the local mines." (Italics ours.)

The decree of the lower court was reversed upon the ground that as the Commission's jurisdiction over the subject matter was exclusive, the courts would not review determinations of the Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions, citing numerous cases.

As applied to the case at bar, the principle followed in the *New River Case* definitely establishes that the Commission, by its order in the *First Case*, "clearly permitted and authorized"—indeed, required—the carriers to apply a rate not exceeding 96½ cents. It was "the plain intent and purpose of the Commission" that rates observing that figure as a reasonable maximum "should be applied". The Commission's determination was conclusive, as long as effective, for

it was unquestionably valid; and under the rule of the cited case, it was not subject to collateral review as to its wisdom or expediency. It became the conclusive measure of the carriers' duty under the act, so far as a reasonable rate for the particular service in question was concerned; and their compliance with the order therefore completely discharged their statutory duty in the premises.

We conclude that the respondents' publication and collection of rates in compliance with the Commission's conclusive and continuing determination in the *First Case* completely fulfilled their obligation to maintain just and reasonable rates, for the rates which were thus published and applied were, during the period of approved operation of the Commission's order, conclusively established as just and reasonable. It follows that the carriers committed no violation of the Act in the premises; and since the Commission's jurisdiction to award reparation must depend upon a violation of the Act, the Commission was without jurisdiction to make the order sued upon, which is therefore void and of no effect.

(c) All the reported court decisions declare and sustain the proposition that a regulatory tribunal, exercising functions similar to those of the Interstate Commerce Commission, cannot award reparation for the charging of rates which such tribunal has itself prescribed or approved. There is no reported decision holding to the contrary.

While the instant case is the first in which this court has been called upon to determine directly the question whether the Interstate Commerce Commission

may validly award reparation against rates published and maintained in conformity with its valid findings and valid continuing formal order, the same or a substantially similar question has arisen in cases heretofore decided by the inferior federal courts and the highest courts of several of the states. In every case those courts have declared that a regulatory commission, exercising jurisdiction similar in general to that exercised by the Interstate Commerce Commission, cannot validly award reparation for the collection of rates published and applied pursuant to its approval and authority. Moreover, this court, in at least two of its decisions, has indicated that there can be no right to reparation for the collection of charges published and applied by authority of the Interstate Commerce Commission.

(1) *Decisions of this court supporting respondents' contentions.*

We call particular attention to this court's decision in:

Keogh v. C. & N. W. Ry. Co. (1921), 260 U. S. 156 (already cited).

In that proceeding a shipper attempted to recover damages from various railroad companies, for asserted violations of the Sherman Anti-Trust Act, it appearing that the railroads, acting in concert through an association to which they all belonged, had published and assessed uniform rates upon the plaintiff's interstate traffic. The rates in question had been investigated, and approved or prescribed, in a number of

formal proceedings before the Interstate Commerce Commission. As this court took pains to state, the instrument by which the plaintiff was alleged to have been damaged consisted of rates approved by the Commission.

This court held that the plaintiff had no cause of action, as asserted. After stating that the rates in question were fixed as reasonable and non-discriminatory, by virtue of the proceedings before the Commission, it said:

> "What rates are legal is determined by the Act to Regulate Commerce. Under Section 8 of the latter Act the exaction of any illegal rate makes the carrier liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages, either by complaint before the Commission or by an action in a Federal Court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. * * * Can it be that Congress intended to provide the shippers from whom illegal rates have been exacted with an additional remedy under the Anti Trust Act? *And if no remedy under the Anti Trust Law is given, where the injury results from the fixing of rates which are illegal because too high or discriminatory, may it be assumed that*

Congress intended to give such a remedy where as here the rates complained of have been found by the Commission to be legal and, while in force, had to be collected by the carrier?

"Section 7 of the Anti Trust Act gives a right of action to one who has been injured in his business or property. Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes the legal rate as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." (Emphasis supplied.)

This court also directly compared the right of action asserted by the plaintiff with that relied upon in cases where shippers seek to recover damages under the Interstate Commerce Act, saying:

"Under Section 7 of the Anti Trust Act, as under Section 8 of the Act to Regulate Commerce * * * recovery cannot be had unless it is shown that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. Here the instrument by which the damage

is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers."

The instant proceeding presents a direct parallel to the *Keogh Case*. Here the petitioner is alleged to have been damaged by the assessment of a rate which had previously been prescribed by the Commission, and continued in effect in accordance with the Commission's conclusive formal order. In the *Keogh Case* this court held that no legal damage was inflicted upon the shipper under analogous circumstances: that no wrong had been committed by the carriers, upon which an action sounding in tort could be predicated, by their collection of the rates approved by the Commission. The same principle should govern the instant case: that is, this court should conclude that no wrong, giving rise to a right to damage, can have been committed by respondents in collecting rates which had the Commission's stamp of approval when charged, and were in fact maintained and applied by respondents in conformity with a conclusive formal continuing order of the Commission, validly issued pursuant to the provisions of the Interstate Commerce Act.

In:

S. P. Co. v. I. C. C. (1911), 219 U. S. 433, (already cited)

this court had under consideration the validity of an order of the Commission prescribing certain reduced

rates for the future. At the conclusion of its opinion this court said (219 U. S., at p. 452):

> "The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law, the order of the Commission has spent its force, and therefore the question for decision is moot. * * * It is to be observed that clearly the question is without merit *in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined;* and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." (Emphasis supplied.)

We direct particular attention to the italicized portion of the foregoing quotation. That expression can only be understood to mean that if the legality of the order were affirmatively determined, there could be no possible liability for reparation to which the railroads might be subjected: their compliance with a legal and valid order of the Commission establishing the rates to be charged could not create any right to reparation for the assessment of charges predicated upon the rates thus prescribed.

(2) *Decisions of state courts and inferior federal courts which support respondents' contentions.*

The earliest decision of any court, state or federal, with which we are familiar, in which an issue similar to that here raised was presented, was rendered by the United States Circuit Court for the Western District of Missouri in:

Winsor Coal Co. v. C. & A. R. Co. (1892), 52 Fed. 719.

It was there held that a rail carrier was not liable, under a state statute permitting a recovery of a penalty for the exaction of an unreasonable freight rate, where it appeared that the Missouri State Commission was required by law to see that all schedules of rates adopted by common carriers were reasonable and just, and that the defendant carrier had in fact published rates in conformity with the determination thus made by the state tribunal.

Very recently, the United States District Court for Arizona (three judges sitting) has permanently enjoined the Arizona Corporation Commission from enforcing an order directing the payment of reparation for the collection of intrastate freight rates which had been approved and/or prescribed by the Arizona Commission, prior to their application and collection. The decision is reported as:

E. P. & S. W. R. Co. v. A. C. C. (July 20, 1931), 51 Fed. (2d) 573.

The following excerpt from the court's opinion is particularly pertinent:

> "We are convinced that when the Arizona Corporation Commission has approved and authorized a rate to be collected, and the carrier has collected that rate and nothing in excess thereof while the rate was in force, the Commission has no authority to order a reparation, even though it should thereafter find, as it did in this case, that the rate so prescribed was excessive. The same rule applies to rates fixed by the Interstate Commerce Commission (*Atchison, T. & S. F. Ry. Co. v. Arizona Grocery Co.* (C. C. A.) 49 F. (2d) 563)."

The decision of the Supreme Court of Washington in:

N. P. Ry. Co. v. Department of Public Works (1925), 136 Wash. 389; 240 Pac. 362,

is likewise closely in point in the instant case.

Under the statutes of Washington, carriers are charged with the duty of initiating their rates, subject to review upon complaint by the state regulatory body. It is also provided that the state tribunal may, upon complaint, and after investigation, require a public utility company which has charged an unreasonable rate, etc., to refund the difference between the rate so charged and that which would have been reasonable for the service. That section of the statute is the obvious correlative of similar provisions of the

Interstate Commerce Act which provide that the Interstate Commission may award damages for violations of the Act as a result of which shippers are injured. The Washington statute also contains a provision, similar to that found in Section 1, (4, 5,) of the Interstate Act, requiring charges made for any service rendered in the transportation of persons or property by carriers to be just, fair, reasonable and sufficient. In other words, the legal requirements and the procedure contemplated in Washington are substantially equivalent to those laid down by the Interstate Commerce Act.

In this proceeding, it appeared that the carriers had complied with a prior order of the Department of Public Works prescribing the method of measuring cordwood for purposes of transportation. Subsequently a second complaint was filed, and the Department revised its prior determination, and found that the method of measurement previously prescribed resulted in unreasonable charges. It prescribed a new method, the effect of which was to reduce such charges. It also found that the carriers' charges, assessed upon the basis prescribed in the first decision, had been unreasonable, and that the shipper was entitled to recover the difference. In short, the situation differed in no essential respect from that presented in the instant case, for it was admitted that the carriers had complied with the first order issued by the state tribunal, just as it is established here that

the defendants duly complied with the Interstate Commission's order in the *First Case.*

The Supreme Court of Washington held that there was no right to reparation or refund under the circumstances. It said:

> "During that time the carriers complied strictly with the order of the department, and after the effective date of the second supplemental order apparently complied strictly with the order basing measurement of short lengths of wood piled loosely in racked cars at 192 cubic feet per cord.
>
> "It is manifest, therefore, that since all the shipments complained of by the Roosevelt Transfer & Fuel Company were received during the period when the department order was in force fixing the standard at 128 cubic feet per cord, there was nothing illegal in what appellant did. The rates and standards were in force, and while in force were the only lawful rates and standards. *C. B. & Q. R. Co. v. Merriam* (C. C. A. 8) 297 F. 1. The orders of the department were prospective and in no way retroactive by their own terms.
>
> "The statutes governing the procedure are sections 10433 and 10434, Rem. Comp. Stats. The first provides:
>
> > 'When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the com-

mission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.'

"The second section reads:

'The director of public works shall have power and it shall be his duty, upon complaint in writing being made to him, to determine the amount of overcharge made and refund due in all cases where any public service company, as defined in this chapter, charges an amount for any service rendered in excess of the lawful rate in force at the time such charge is made, or which may thereafter be declared to be the legal rate which should have been applied to the service rendered, and to determine to whom the overcharge should be paid. * * *'

"Appellant contends that under section 10433, supra, the complaint of the Roosevelt Transfer & Fuel Company did not state a cause of action, and the evidence before the department and the trial court does not warrant any relief.

"Respondent relies upon section 10434, supra, and also upon section 10345, which contains a provision to the effect that:

'All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more

common carriers, shall be just, fair, reasonable and sufficient.'

"Respondent therefore contends that under section 10434 and section 10345, the rate, in order to be lawful, must not only be the rate found in the tariff of the carrier on file with the department, but must also be 'just, fair, reasonable, and sufficient,' and that section 10434, supra, is designed to include rates charged unlawfully on either ground and is not restricted to the overcharge of a tariff rate.

"We cannot accept the construction of respondent. Section 10434, supra, specifies charges for services rendered 'in excess of the lawful rate in force at the time such charge was made.' The charges here made were not in excess, but in conformity, with the lawful rate in force at the time they were made. That section also refers to charges which may 'thereafter be declared to be the legal rate which should have been applied to the service rendered;' and this, respondent thinks, is sufficient to justify the action of the department.

"That provision evidently deals with complaints as to charges exacted by carriers which have never been adjudicated, and upon which the department was authorized to find the reasonable charge for such past service, and make it both prospective and retroactive, and provide for reparation. It certainly does not authorize the department to make an order at one time to operate only prospectively, and to return to the same subject-matter later, after the carriers have complied with the order of the department, and award

reparation of charges legally established, as unjust and unreasonable.

* * * * * * *

"While the previous order was in force the presumption obtained that the standard of 128 cubic feet per cord was a reasonable standard which carriers were obliged by law to observe. That is what appellant did in this case, and *it seems to us that it is not to be penalized for complying with the effective orders of the department.* Under other statutory provisions they were liable to prosecutions and fines for noncompliance." (Italics ours.)

It is impossible to avoid the persuasive force of this decision. It was rendered under circumstances so closely analogous to those presented in the present case that no real distinction can be drawn. It definitely and squarely upholds the principle for which we contend: namely, that a carrier which, in good faith, complies with a valid continuing order of the commission, and published and establishes rates which conform to the spirit and terms of that order, is not to be penalized as a violator of the statute, through the medium of reparation awards, for having obeyed the law and performed its legal duty in the premises.

Other decisions of state courts in which substantially similar conclusions have been reached include:

M. K. & T. Ry. Co. v. Railroad Comm. of Tex., 3 S. W. (2d) 489; 13 S. W. (2d) 680;

Mathieson Alkali Works v. N. & W. Ry. Co., 147 Va. 426; 137 S. W. 608;

Miller Mill Co. v. L. & N. R. Co., 207 Ala. 252;
Young Co. v. Payne, 127 Miss. 48;
T. & P. Ry. Co. v. Railroad Comm., 137 La. 1059;
Bonfils v. Public Utilities Comm., 67 Colo. 563.

Our opponents are familiar with these decisions of the state and federal courts, and have attempted to distinguish the situations there involved. They point to the fact that the state tribunals ordinarily are charged, either by state constitution or by statute, with the primary duty of initiating all rates of carriers subject to their jurisdiction, whereas under the federal act the carriers themselves initiate their rates, which are, however, subject to review and correction by the Federal Commission, either upon the complaint of interested shippers or upon the Commission's own motion. It may be noted initially that this attempted distinction does not apply to the *Northern Pacific Railway Company Case*, supra, decided by the Supreme Court of Washington, for in that state the procedure by which rates are fixed is substantially the same as that followed in interstate commerce; that is to say, the carriers themselves initiate their rates, and those rates become Commission-made only after they have been subjected to review, and are either approved or changed by the governmental tribunal.

In any event, however, the attempted distinction is wholly without merit. In those states where a rate cannot be effective until first submitted to and approved by the state commission (which includes Texas,

Virginia, Louisiana, Alabama, Mississippi and Arizona, referred to in the decisions cited), the action of the state commission is conclusive, and a rate thus approved or prescribed becomes, for all purposes, the reasonable and lawful rate thereafter to be applied until further order. It matters not that that characterization applies to *all* rates, and that no rate can become effective until it has been submitted to and approved by the state tribunal. A rate upon interstate traffic which has been submitted to and approved by the Interstate Commission, or is the result of a direct affirmative continuing order of the Interstate Commission, is likewise conclusively established as a just, reasonable and lawful rate. In short, there can be no distinction between a rate established pursuant to a general jurisdiction, under which the regulatory body is required to prescribe and approve all rates, and one which becomes effective pursuant to the exercise of a jurisdiction of review, in the course of which it has been subjected to particular examination. In fact, the latter rate, having been subjected to particular and individual inquiry, is more to be regarded as conclusively just and reasonable, and thus not subject to retroactive reduction for the purpose of reparation.

The decisions above referred to include all the reported cases of which we have knowledge, in which the courts have dealt directly with the point here in issue. Regardless of our opponents' attempts to explain away

these decisions, they cannot escape the fact that they unanimously support the principle for which we contend; namely, that those portions of the Interstate Commerce Act which empower the Commission to award damages for a carrier's violation of the statute do not purport to give the Commission jurisdiction to award reparation for the charging of a rate which has previously been expressly prescribed or approved, and declared to be reasonable, and which a carrier has been authorized to charge by a formal continuing order by the Commission itself. We have been unable to find any reported decision (and our opponents have failed to cite any such decision, at any stage of this case), in which this court, or any inferior court, has ever approved or sustained an award of reparation made by a regulatory commission, for the collection of a rate which that commission has either prescribed or approved for future application, or where the rate charged was less than a rate so fixed or approved: regardless whether such prescription and/or approval was the result of a general statutory jurisdiction requiring all rates to be approved before being placed in operation, or resulted from the investigation of a particular rate.

(3) *Discussion of decisions relied upon by petitioner and amici curiae supporting petitioner.*

Several cases are cited by our opponents to support their contention that the Commission has power to

award damages for the collection of a rate which it has prescribed or approved by formal continuing order. The first of these is this court's decision in:

Reagan v. Farmer's Loan and Trust Co. (1894), 154 U. S. 362.

A very brief examination of that case will show that it does not in any sense support the assertions of our opponents. In the *first* place, the precise issue was whether representatives of a railroad company might, by suit in the federal courts, enjoin the enforcement of rates prescribed by the Texas Railroad Commission for application upon Texas intrastate traffic, the basis for the suit being that the schedules in question were so unjustly and unreasonably low as to work a substantial destruction of the carriers' property rights. No question of the reparation powers of the Texas Commission or of any other Commission was involved at all. The only issue was whether the injunctive power of the federal courts might be invoked to restrain the further operation of the entire intrastate schedule of rates, "and not of any particular rate upon any class of goods" (154 U. S., at p. 400).

In the *second* place, this court could not possibly have considered, even for purposes of illustration, the question whether the Interstate Commerce Commission possessed any power to award reparation, as to rates which it had previously prescribed. The litigation arose in 1891 and 1892, and the decision was ren-

dered in 1894. At that time the Interstate Commerce Act did not confer upon the Commission any power to prescribe reasonable rates for the future. Jurisdiction in those respects was not conferred until the enactment of the *Hepburn Amendment of 1906* (34 Stat. 584).

In the *third* place, the expressions in the opinion in the *Reagan Case* upon which our opponents rely, if properly studied and construed in conjunction with the remainder of the opinion, support our position in the instant case and deny the very jurisdiction which petitioner seeks to assert on the part of the Commission. *Finally*, even if those expressions could possibly be construed as contended by our opponents, they are dicta which conflict with later pronouncements of this court: e. g.,

T. & P. Ry. Co. v. Abilene Cotton Oil Co. (1907), 204 U. S. 426, 448;
Mitchell Coal Co. v. Pa. Ry. Co., supra;
Phillips v. Grand Trunk Western Ry. Co., supra.

We call especial attention to the expressions found in the opinion in the *Mitchell Case* (230 U. S., at p. 259).

The fact that the Commission, at the time of the decision in the *Reagan Case*, had no power to prescribe rates for the future renders any expression in the opinion, even if construed as relating to the sup-

posed power to award reparation against Commission-made rates, pure dictum and of no controlling force. Of course, pronouncements of this court, even though by way of dicta, are entitled to the greatest respect; but this court has frequently declared that its dicta cannot be regarded as controlling, when cited upon an issue which was not, and in the very nature of things could not have been, presented to or even considered by the court.

Webster v. Fall (1925), 266 U. S. 507;
Wolff Co. v. Industrial Court (1925), 267 U. S. 552.

Our opponents also refer, particularly in petitioner's brief (pp. 28, 44-46), to this court's decision in:

T. & P. Ry. Co. v. Abilene Cotton Oil Co., supra,

as supporting their position. Careful analysis of the opinion, particularly the portions quoted by petitioner, reveals that they do not sustain its contentions in any respect. The essential question there before this court was whether an action at law for the damages sustained by the charging of an unreasonable interstate rate might be brought in a court of competent jurisdiction, without preliminary resort to the Interstate Commerce Commission; or whether there must first be an investigation and determination of the administrative question involved (i. e., the reasonableness of the rate attacked) by the Commission, before proceedings in court could be commenced. This court held

that there must be such preliminary resort to the Commission; that the Commission's power extended to the awarding of reparation in favor of individuals who might have suffered from the application of an unreasonable schedule of rates, although the unreasonable schedule was not, at the date of the complaint, in force any longer. In other words, the court simply held that even though an unreasonable schedule of rates, duly published in carriers' tariffs, might have been changed for the future either by voluntary action of the carriers or as a result of an affirmative order for the future by the Commission, the Commission would still have power to consider complaints and to award reparation for damages sustained by the charging of the unreasonable rates during the period preceding the change. There is no suggestion that the question of reparation against rates prescribed as reasonable by the Commission, and published by carriers in conformity with its valid findings and orders, was presented to or considered by the court, even for purposes of illustration. In fact, in 1901, when the litigation arose, the Commission had no power to prescribe reasonable rates for the future, and did not receive such power until 1906. The sole question was whether resort must be had to the Commission, by a shipper endeavoring to obtain reparation against carrier-made (not Commission-made) rates which, though reduced for the future, had been applied to shipments moving prior to the reduction. The decision not only lends no support to petitioner's argument; on the contrary, to

the extent that it bears at all upon the essential issue here presented, it is an authority in our favor, for it directly establishes that the Commission's power to award reparation is capable of exercise only when it appears that a carrier has violated the Act, and has thereby caused damage to a shipper.

Our opponents likewise refer, apparently with some confidence, to the recent decision of the Circuit Court of Appeals for the Fifth Circuit in:

Eagle Cotton Oil Co. v. Southern Ry. Co. (July 21, 1931), 51 Fed. (2d) 443 (already cited).

While that case involved circumstances which, in our opinion, present some similarity to the instant case, the decision of the court is in no sense in conflict with the principle for which we contend, or with the decision of the Circuit Court of Appeals for the Ninth Circuit here under review. The question involved in the *Eagle Case* was in a sense twofold: *first*, whether the rate charged upon the shipments involved for purposes of reparation was, upon the facts shown, a rate prescribed or approved by the Commission; and *second*, whether, if the rate in question was a Commission-made rate, the Commission's order awarding reparation for its collection was valid and enforceable. The opinion recites the essential facts, and shows that the court concluded that the rate in question, as applied to the plaintiff's shipments, was not "Commission-made"; that is to say, it was not maintained and applied pursuant to, or in conformity with, an out-

standing and continuing formal finding or order of the Interstate Commerce Commission. The court therefore said:

> "Having reached this conclusion (that the rate in question was not Commission-made) it is not necessary in this case to decide, and we do not decide, whether or not the power of the Commission to award reparation extends to rates of its own making. The decision of the Circuit Court of Appeals for the Ninth Circuit in *A. T. & S. F. Ry. Co. et al. v. Arizona Grocery Co.*, 49 Fed. (2d) 563, to the effect that the Commission was without jurisdiction to award reparation, proceeded on the theory that the rates there involved were Commission-made. The rate here involved in our opinion was made by the carriers, and if it was, of course, the Commission, upon a valid finding that it was excessive, had the power to award reparation."

Our opponents also refer to the separate concurring opinion of Judge Hutcheson in the *Eagle Case*. While that opinion is, of course, entitled to respect, it cannot be regarded here as a precedent; for it is not the opinion of the court, and did not receive the concurrence of Judge Hutcheson's associates, who did not disagree with the opinion of the Ninth Circuit Court herein.

Some reference is made in the argument of our opponents to decisions of the Interstate Commerce Commission in which it has undertaken to assert that it possesses jurisdiction to award reparation against

rates of its own making. However, it can hardly be argued, with any sense of propriety, that the Commission's conclusion upon a question of law (i. e., as to its own jurisdiction upon a particular state of facts) is conclusive and binding. The leading decision by the Commission upon which our opponents rely is that rendered in the *Third Case*, out of which this particular litigation arises. The argument that that decision should be accepted as a conclusive authority here simply begs the question, for it assumes that the Commission has correctly answered the very question which is now before the court, and that its answer must be regarded as controlling. Neither this court, nor the inferior federal courts, have ever regarded the Commission as the ultimate arbiter of questions of law arising under the Interstate Commerce Act. They have frequently reversed the Commission's conclusions upon such matters, particularly as relating to the powers conferred upon it by the statute. Compare, for example:

U. S. v. Mo. Pac. R. Co. (1929), 278 U. S. 269;
S. P. Co. v. I. C. C., supra;
U. S. v. N. Y. C. R. Co., supra;
Ann Arbor R. Co. v. U. S., supra;
Hohenberg v. L. & N. R. Co. (1931), 46 Fed. (2) 952; certiorari denied, No. 70, Oct. term, 1931.

(4) ***Discussion of grounds upon which Commission's assertion of jurisdiction in the Third Case was based.***

It is appropriate at this point again to refer somewhat briefly to the Commission's opinion in the *Third Case,* particularly to the portions thereof (R. 306, 307; 140 I. C. C. 171, at p. 180) wherein the Commission seeks to explain and justify its assertion of power to award reparation against the rates which it had itself previously prescribed in the *First Case.*

It will be observed that the Commission did not, in the *Third Case,* declare either expressly or by implication that conditions had changed to such an extent as to place the carriers on notice that the rates previously authorized had become unreasonable "in fact"; furthermore, it did not attempt to fix any date at which the Commission-made rates prescribed in the *First Case* had become unreasonable. It did not assert that the rate prescribed in the prior case was only a "maximum" rate (and not a reasonable rate), as petitioner contends; on the contrary, it recognized that in the *First Case* it had undertaken to prescribe a *reasonable* rate.

All that the Commission did was to make a collateral attack upon its prior findings, and to say, in support of that action: *first,* that it was not bound by the doctrine of *res adjudicata;* and *second,* that it reserved the right, upon a more comprehensive record, to modify previous findings when it appeared that such findings would not accord substantial justice under the law which it administers.

We may emphasize again that the doctrine of *res adjudicata* was not and is not involved. The Com-

mission's reference to its freedom from the necessity of observing that rule was wholly inapposite. It is not and never has been contended that the Commission's legislative order in the *First Case*, once made, must for all time stand unchanged, or control future proceedings in which the same subject matter might be involved. It is conceded that changes of that legislative order might be made, if in the Commission's opinion changed conditions or other circumstances warrant; but, of course, such changes must also be legislative in character, and therefore prospective in operation only.

The Commission's assertion that it reserves the right to modify previous findings, and to give retroactive effect to that modification, of course can have no weight, unless the power is constitutionally vested in the Commission by the statute.[1] The Commission says that the record before it in the *Third Case* was for the first time comprehensive in the evidence which it contained bearing upon the reasonableness of the rates assailed. That statement is not founded upon any fact of record, for the record in the former case was not before the Commission when the *Third Case* was decided. In any event the statement amounts in substance to the assertion that upon a different record, now before it, the Commission is of opinion that it made a mistake before, which it reserves jurisdiction to correct. The conclusion which necessarily follows, if the Commission's argument is sound, is that a carrier cannot rely upon any order of the Commission purporting to pre-

(1) *Brimstone R. & C. v. U. S.*, 276 U. S. 104 (already cited).

scribe a reasonable rate, except at its peril of being found guilty of an infraction of the statute, and compelled to respond in damages, if the Commission subsequently changes its mind in a collateral proceeding. The order in the *First Case* recites that it was made after full hearing and investigation: a recital of fact which the Commission completely ignored in asserting that in the *Third Case* it was for the *first* time possessed of a comprehensive record. If the Commission was correct in ignoring that recital, and in asserting the retroactive power which it undertook to exercise, there is nothing to prevent it from entertaining still another complaint involving the same subject-matter, and concluding that its findings in the *Third Case* were based upon an incomplete record, and that a further retroactive readjustment is necessary; and so on, *ad infinitum*.

The essential lack of equity inherent in the exercise of this asserted retroactive power is forcefully illustrated by the decision in the *Third Case*. In the *Second Case* the Commission reduced the rate from northern California points to Phoenix to 71 cents, from and after February 25, 1925. That rate was duly published, and continued in effect until the decision in the *Third Case*. In the *Third Case* the Commission found that it had erred in prescribing the 71-cent rate, and that a proper rate in the past should have been 73 cents from northern California points; and the lack of equity arises from the fact that while the Commission found that during a part of the period preceding its last order, a rate of 73 cents would have

been reasonable, nevertheless the law provides no machinery by which the carriers could recover the difference. They were without any remedy whatsoever.

It should also be noted that the Commission's conclusions as to its jurisdiction, announced in the opinion in the *Third Case,* as well as in the various cases referred to in its brief (at p. 20) filed herein as Amicus Curiae, are in direct conflict with numerous other decisions in which it has recognized that no right to reparation exists, where it appears that the rates attacked are equal to or less than those which it has previously approved or prescribed. Compare, for example:

Morrell & Co. v. N. Y. C. R. Co. (1927), 120 I. C. C. 537, 544;

Eastern Livestock Cases (1928), 144 I. C. C. 741, 781;

Rate-Structure Investigation—Iron and Steel Articles (1929), 155 I. C. C. 517, 567;

National Petroleum Assn. v. M. K. & T. Ry. Co., et al. (1917), 47 I. C. C. 355, 363;

Ariz. Lumber Co. v. A. E. R. Co., et al. (1925), 96 I. C. C. 203, 206;

National Coffee Co. v. G. C. & S. F. R. Co., et al. (1924), 92 I. C. C. 14, 16;

Oklahoma Corp. Comm. v. A. & S. R. Co., et al. (1925), 101 I. C. C. 116, 132.

We ask this court to conclude, consistent with the uniform current of pertinent judicial authority, that

the Act is not to be construed as conferring upon the Commission jurisdiction to award reparation with respect to shipments which have moved under rates published in conformity with its valid formal findings and valid continuing formal order establishing the reasonable rates thereafter to be observed; and that the reparation order which forms the basis of petitioner's suits is therefore invalid and unenforceable.

III.

IF THE ACT WERE SO CONSTRUED AS TO CONFER UPON THE COMMISSION POWER TO AWARD REPARATION UNDER THE CIRCUMSTANCES HERE PRESENTED, IT WOULD TO THAT EXTENT BE UNCONSTITUTIONAL AND VOID, IN CONTRAVENTION OF THE DUE-PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Fifth Amendment to the Constitution of the United States, insofar as material here, provides simply that "no person shall be * * * deprived of * * * property without due process of law". It is our position that if the Interstate Commerce Act were to be construed as conferring upon the Commission jurisdiction to award reparation against rates equal to or less than a rate which the Commission has itself prescribed or approved as a reasonable maximum, it would to that extent be unconstitutional and void, in that respondents' lawfully acquired property would be taken without the observance of the due process of

law guaranteed by the amendment. It may be observed, in this connection, that the Circuit Court in its opinion (R., 454, 455) has declared that this point is well taken, although it has not decided that the Act is unconstitutional because it confers such jurisdiction; on the contrary, the Circuit Court, in conformity with the controlling pronouncements of this court, has construed the Act as not conferring the jurisdiction asserted by the petitioner, thus avoiding any necessity of calling its validity into question under the Constitution.

Harriman v. I. C. C. (1908), 211 U. S. 407, 422;
Ann Arbor Ry. Co. v. U. S., supra (281 U. S., at p. 669).

(a) The Commission in awarding reparation exercises quasi-judicial power, as an agency of the judicial arm, and not of the Congress. In so doing, it is bound by its prior legislative determinations and must act with reference only to the law and the facts as they existed at the time the asserted right to damages arose.

As already pointed out, the Commission, which is simply an agency of the federal government, created by the Act and charged with the administration of a particular field of statute law, exercises dual functions. When it prescribes a rate for the future it acts in a legislative capacity, as the delegated agent of the legislative arm; but in awarding reparation (damages) arising out of asserted violations of law in the past, it acts solely as an agency of the judicial arm. This

viewpoint is not disputed by our opponents, who in fact have insisted, throughout this case, that the Commission's order for the payment of reparation upon which petitioner's suits depend was made by the Commission in an attempt to exercise its purely judicial functions and not in the exercise of its administrative or quasi-legislative power. In:

Baer Bros. v. D. & R. G. R. Co. (1914), 233 U. S. 479 (already cited),

this court said (at p. 486):

> "But awarding reparation for the past and fixing rates for the future involves a determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity to prevent future injury to the public."

In:

Great Northern R. Co. v. Merchants' Elevator Co., 259 U. S. 285 (already cited),

this court said further (at p. 291):

> "To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function."

That the Commission is acting merely as an arm of the judiciary (i. e., as an agency of the court to estab-

lish merely a rebuttable presumption as to the facts) is forcefully demonstrated by this court's opinion in:

Meeker v. Lehigh Valley R. Co. (1915), 236 U. S. 412,

in which it was said (at p. 430):

> "It is also urged, as it was in the courts below, that the provision in Section 16 that, in actions like this, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.
>
> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents."

Acting in its judicial capacity, the Commission can take no action greater or different than that which a court itself might take under similar circumstances. Particularly, it must be bound by the law and the facts as they existed at the time the asserted cause of action arose.

Prentis v. A. C. L. R. Co., 211 U. S. 210 (already cited).

Furthermore, no court, undertaking to review a legislative determination by the Commission, could substitute its own judgment for that of the Commission,

and undertake to declare unreasonable that which the Commission by a valid prior legislative order had determined to be reasonable. A court under such circumstances could go no further than to determine whether the order of the Commission was validly made, within its statutory and constitutional powers, and predicated upon proper evidence; and if invalid, to enjoin the further operation of the Commission's order. Compare:

U. S. v. New River Co., supra;
I. C. C. v. U. P. R. Co., supra; and other cases cited in our argument under subdivision I (d).

The Commission, acting purely as a judicial agency (and our opponents insist that its action to award reparation here has been undertaken in the exercise of that function only) is subject to the same limitations as those which govern the action of a duly constituted court.

In other words, under our Constitutional system there is but one forum for the determination of a controversy as to private damages and that is a court, and (in the case of reparation under the Interstate Commerce Act), the Commission, acting as an agent of the court. Under the theory of petitioner, the Commission and the court would, in a controversy involving private damages, exercise a power which admittedly the court would not have in the case of an action to annul an order of the Commission for the

future; that is, the power to question the justness and reasonableness of an act of the Commission performed in its quasi-legislative capacity.

(b) The due-process clause of the Fifth Amendment prohibits any action on the part of the Commission, the effect of which would be to divest respondents of property theretofore properly acquired in direct conformity with the Commission's own prior valid legislative pronouncement.

While our opponents insist that the Commission's attempt to award reparation against the rates established pursuant to its prior legislative order was an exercise of purely judicial functions, we anticipate that it may nevertheless be asserted that in making the findings upon which the reparation order was based, it was acting in an administrative or quasi-legislative capacity. That argument is not tenable, as is shown at once upon reference to the *Baer Bros., Meeker* and *Great Northern Cases,* supra. But even if it were sound, it amounts simply to a contention that the Commission may make a retroactive legislative determination, modifying a prior valid and conclusive pronouncement; and may, upon such determination, divest property rights which have lawfully vested, pursuant to its prior order.

The Commission's findings and order in the *First Case* were promptly and literally accepted and obeyed by the carriers, who established and maintained their rates in conformity therewith. The petitioner and other shippers likewise accepted the order as valid,

and made their shipments and paid the charges thereon, according to the rates established pursuant to the decision. The carriers thus sold their transportation services at prices established in conformity with the legislative pronouncement issued by the Commission as the congressional agency, and collected charges determined to be reasonable, in fact and law, by the only body authorized to do so. When the transportation services were completed, the charges thus collected passed into the possession and ownership of the carriers and became their vested property. They could not thereafter be lawfully deprived of that property, even though the rate upon which the charges were predicated might lawfully be changed for the future, by the same agency which prescribed it in the first place. Neither the Commission, nor any other agency of the federal government subject to the prohibitions of the Fifth Amendment, could undertake by retrospective action to deprive the carriers of their vested property, acquired in strict conformity with the law in effect at the date the transactions were performed and completed.

The nature of the due process which the Fifth Amendment enjoins upon the governmental agencies has been considered in a vast number of decisions, and it will suffice here to quote briefly from a few of the leading pronouncements of this court. The decisions show that this court has consistently held that any action, by any agency of the federal government, whether styled administrative, legislative, or quasi-

judicial, is a denial of due process if it is not conformable with the fundamental principles of natural justice and of our system of government and of jurisprudence. Particularly, the decisions establish that a retroactive enactment by a legislature or legislative agency, undertaking to divest property rights which have been lawfully acquired in accordance with a prior act of the same legislature in effect at the date of the vesting, is wholly forbidden by the due-process clause, and invalid and of no effect whatsoever. In:

Fletcher v. Peck (1810), 6 Cranch (10 U. S.) 87; 3 L. ed. 162,

this court said (at p. 135):

> "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that the legislature cannot abridge the powers of a succeeding legislature.
>
> The correctness of this principle, so far as respects general legislation, can never be controverted. *But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.*" (Emphasis supplied.)

In:

Forbes Pioneer Boat Line v. Board of Commissioners (1922), 258 U. S. 338,

this court held that the existing right of a vessel owner to recover back toll unlawfully collected from him for

passing through the lock of a canal cannot, consistently with the federal Constitution, be taken away by a state statute thereafter enacted, purporting to validate such collection. The federal inhibition referred to by the court was, of course, the prohibition upon acts of a state which take property without due process of law, set forth in the Fourteenth Amendment; but the same principle applies to acts of a federal agency, subject to the prohibitions of the Fifth Amendment.

In:

Blodgett v. Holden (1927), 275 U. S. 142, 72 L. ed. 206;

it was held that the Revenue Act of 1924, by which a tax was levied upon gifts *inter vivos,* could not, in view of the prohibitions of the Fifth Amendment, be construed as imposing a tax upon a gift fully completed and consummated prior to June 2, 1924, the date upon which the statute was approved. The conclusion was as follows:

> "So far as the Revenue Act of 1924 undertakes to impose a tax because of gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment."

The decision in the *Blodgett Case* was approved and applied to a similar transaction, by this court's decision:

Untermyer v. Anderson (1928), 276 U. S. 440.

Other leading decisions of this court in which the due-process clause has been considered, and the nature of the prohibitions laid upon government agencies has been defined, include:

Calder v. Bull (1798), 3 Dallas (3 U. S.) 385 (at pp. 388, 391);

Murray's Lessee v. Land Company (1856), 18 How. (59 U. S.) 272 (at pp. 276, 277);

Hurtado v. Calif. (1884), 110 U. S. 516 (at pp. 535, 536);

Twining v. New Jersey (1908), 211 U. S. 78 (at pp. 101, 102).

The Commission, as the agency of Congress, can have no greater authority than the Congress itself. The Fifth Amendment is held by this court to prohibit the Congress from attaching a retroactive liability, by way of tax, to a transaction which was consummated and completed in accordance with contemporary law. The congressional agency is therefore equally prohibited from taking any retrospective action, the effect of which would be to penalize transactions which were completed in accordance with the established law of the time, and from taking from the respondent carriers, by means of retroactive collateral orders awarding reparation, property which they have justly and lawfully acquired through their observance of the continuing valid findings and orders of the Commission itself. Certainly if direct retroactive action by Congress is forbidden in the premises, it cannot

successfully be argued that Congress could evade the prohibition, and accomplish indirectly that which is directly forbidden, by creating an administrative body clothed with powers which it could not itself exercise.

Petitioner refers (Brief, p. 17) to Section 15(2) of the Act and apparently intends to assert that that portion of the statute confers upon the Commission power to make a *retroactive order*, setting aside an order previously entered. The language of the statute does not support the construction urged by petitioner. Moreover, to interpret the statute as conferring such retroactive power would raise grave doubt as to its constitutionality, and would also conflict with the generally recognized principle that statutes, unless expressly made retroactive in operation, should be construed prospectively.

It will be observed that Section 15(2) expressly provides that all orders of the Commission (except for the payment of money) shall continue in force until further order, unless suspended, modified or set aside. The obvious intent of the section is to give continuing effect to an order, from and after its effective date, and until the Commission issues a further order, in a collateral proceeding, or a supplemental order in the same proceeding, suspending, modifying or setting aside the prior order. There is certainly no express language in the statute which indicates that any modification or setting aside by the Commission may be retroactive; and there is equally no implication, either

in the section itself or elsewhere in the Act, that a valid legislative order of the Commission may be set aside retrospectively. Section 15, including the paragraph referred to, embodies those provisions of the Act which, generally speaking, confer upon the Commission its legislative power to prescribe rates, practices, etc., to be followed by carriers subject to the Act. Orders made pursuant to the provisions of Section 15 (which, it may be added, does not include any provision authorizing the awarding of reparation) are, practically without exception, administrative or legislative in character; and such would be the character of an order undertaking to set aside a prior legislative order. To give to the statute the interpretation contended for by petitioner would be to construe it as operating retrospectively. The retrospective construction of statutes has always been looked upon with disfavor. It is a maxim as ancient as the law itself that a new law ought to be prospective, and not retrospective, in its operation. We quote the following summary of the principles embodied in the decisions of this court and other recognized authorities (25 *Ruling Case Law*, pp. 787, 788):

> "Even though the legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored, and such effect will not be given unless it is distinctly expressed or clearly and necessarily implied that the statute is to have a retroactive effect. There is always a presumption that stat-

utes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common law right, or the effect of giving it retroactive operation will be to destroy a vested right or to render the statute unconstitutional."

Furthermore, as we have shown in our preceding discussion, if the Commission, in making a retrospective order undertaking to set aside a prior legislative order, should also attempt to deprive any party of property rights which had vested and become complete during the period of approved operation of the order, it would to that extent be acting in defiance of the limitations of the due process clause; and if the statute were so construed as to authorize that action, it would itself be unconstitutional to that extent, because in violation of the Fifth Amendment. Any doubt as to the constitutionality of the statute in this respect can best be resolved by construing it as prospective in operation only, and that construction should therefore be followed. The section should not be interpreted as authorizing the Commission to annul or set

aside a prior valid legislative order, except as to its prospective operation.

Our opponents seek to avoid the force of our argument by stating (Petitioner's Brief, p. 29) that we depend upon some asserted vested right in the *continuance of the rate* fixed in the *First Case.* They cite various decisions, including:

Skinner & Eddy Corp. v. U. S. (1919), 249 U. S. 557.

In that decision this court held that there is no vested right in the *continuance of a particular rate or rate-fixing order* of the Commission. It may be conceded that the decisions cited by our opponents state a correct principle; but they are obviously inapposite. We do not assert any such vested right as our opponents affect to believe. We do contend that the order in the *First Case,* issued in the exercise of the Commission's legislative power, determined as a matter of law and for the period during which it continued effective, the reasonable maximum rate which the carriers could charge. That determination was, of course, subject to prospective change by the Commission. The decisions referred to by our opponents simply establish the principle that a legislative order of the Commission is not to be regarded as final and conclusive for all time, and immune to prospective change: a point which is not here involved, and need not be discussed. Our contention is simply that while such change may be prospective, it cannot, under any

theory of law reconcilable with the due-process clause, be made retroactive so as to take from the carriers property which they have acquired in their observance of, and obedience to, the Commission's determination and formal continuing order.

IV.

FURTHER REPLY TO ARGUMENTS ADVANCED BY PETITIONER AND OTHERS SUPPORTING PETITIONER'S CONTENTIONS.

(a) Affirmance of the Circuit Court's decision will neither amend the Act by implication, nor deprive the Commission of any power or authority essential to its regulatory functions.

We have already noted our opponents' contention that affirmance of the decision here under review will be equivalent to a judicial amendment of the Interstate Commerce Act, and will deprive the Commission of an essential portion of the jurisdiction which it now exercises under that statute. It is said that this amendment can arise only by implication, for it does not rest upon any express provision or limitation found in the Act.

Our opponents' contention is quite erroneous; for, as we have shown, the decision of the lower court does not depend upon any implied limitation, but upon the express provisions of the Act, which authorize the Commission to award reparation only when a violation of the Act has been committed by a carrier, as a result of which a shipper has suffered pecuniary damage.

Our opponents are also in error in their assumption that the power to award reparation against Commission-made rates is an essential and indispensable part of the Commission's general regulatory power. It has repeatedly been held that the power to award reparation has no place in a system of regulation which contemplates that the rates charged shall become and continue effective only in response to the direct prior approval of the regulatory body. This doctrine is exemplified by the decisions of the highest courts of Texas, Louisiana, Mississippi, Alabama and Virginia, and of the Federal District Court for Arizona, already noted. See also, *Scott, Magner & Miller v. W. P. Ry. Co.* (1913), 2 Ops. R. R. Comm. of Calif. 626, 636-637.

Moreover, the Commission has itself recognized, in several of its recent annual reports to Congress, that its reparation power is not only not essential to its general powers of regulation, but is in fact, particularly as at present exercised, the source of embarrassment, congestion and grave abuse. In its report for the year 1916 it urged Congress to relieve it at least in part, of its reparation power, and referred at length (Annual Report for 1916, pp. 75-78) to the flood of complaints for reparation then upon its docket, which required individual attention, and prevented proper consideration of more important cases involving rates for the future. It said, in particular:

"Whenever it is thought that there is any prospect of securing an award of reparation,

complaint is brought before the Commission, which necessitates hearing, decision and preparation and printing of a report. The number of such cases is very large, and it is undoubtedly true that if it were not for the hope of securing reparation a majority of the complaints filed would not be presented. * * * *If we had no power to award reparation a mass of cases which now require consideration and decision, with all their attendant detail work and expense, would be kept off the Commission's dockets.* * * *The adoption of such a plan as this would make it possible to apply the energies expended upon rate controversies in the direction of constructive work for the future* instead of expending them upon controversies as to reparation for the past, with every probability that in a majority of the cases the one who ultimately bore the charge will never be reached by the reparation." (Emphasis supplied.)

In its annual report for 1919 the Commission referred to the 1916 report and renewed its recommendation that the power to award reparation should be materially restricted, if not abrogated entirely (Annual Report for 1919, pp. 17-21, 53). In the annual report for 1920 (at p. 78) the Commission referred to its prior annual reports, and again renewed its recommendation to Congress that its power to award reparation should be substantially limited, or transferred wholly to the courts, subject to the necessity of preliminary findings by the Commission as a prerequisite to court action. In the Annual Report for

1921 (at p. 58) the Commission renewed the recommendation made in the 1919 and 1920 reports, in substantially the same language.

In its latest annual report (1930), the Commission (at pp. 90-93) has again discussed its power and duty under the Act with respect to reparation, and has again renewed the recommendations made in the earlier reports above referred to. It has said in particular:

> "The increased number and complexity of these so-called reparation cases have so encroached upon our time and energies as to deprive us of adequate time for the thorough consideration of the many larger and more important problems continually coming before us."

After referring to what was said in the 1916 report (and quoting a portion of its language therein), the 1930 report continues:

> "The practices to which we there referred have not diminished but have greatly increased. These and many other questionable practices are often resorted to.
>
> Another growing class of complaints is found in those involving the applicability of the rates filed pursuant to section 6 of the act, wherein a refund of alleged overcharges is sought. These cases are extremely technical in character, and although many prove to be without substantial merit, all require consideration.

The burden of reparation cases has become heavy and some measure of relief is required in the public interest.

When the interstate commerce act was passed, we were given no power to prescribe rates for the future such as we now have under the amendments of 1906, and it was therefore entirely reasonable that parties who could not secure in advance reasonable rates for prospective shipments should have a considerable length of time after their shipments moved and the unreasonable charges had been paid within which to file complaints for reparation.

At present the cause of action accrues upon delivery or tender of delivery of the property by the carrier and, with certain exceptions, complaints must be filed within two years thereafter, except for overcharges, for which the period is three years. But now that we have been granted quasi-legislative power to prescribe just and reasonable rates for the future, and the rate structure of the country is so largely that which has come out of many formal proceedings before us, over a long period of years, we are of the opinion that these statutory periods should be substantially reduced."

These expressions of the Commission show that it not only agrees with the courts that the reparation power is not an essential and indispensable adjunct of the general power of regulation,[1] but also regards

(1) *Cf. Anadarko Cotton Oil Co. v. A. T. & S. F. R. Co.* (1910), 20 I. C. C. 43, 50.

its exercise as offering a serious and unnecessary handicap to the discharge of the constructive duties which the Act places upon it.

The Commission's general criticism applies with especial force to the asserted power to award reparation against rates which the Commission has itself prescribed or approved. Indeed, the language from the 1930 report, last above quoted, indicates that the Commission agrees, in principle at least, that even if that power now exists, it should be restricted by statute, because of the obvious injustice to the carriers inherent therein; and further, because it is largely, if not entirely, unnecessary under the present system of rate-regulation created by the Act.

The Arizona Corporation Commission, in its brief herein as Amicus Curiae (at pp. 9-13) refers to the general investigation of the national rate structure (I. C. C. Docket No. 17000) undertaken by the Interstate Commerce Commission in response to the Hoch-Smith Resolution (43 Stats. L. 801). It is said that when that investigation has been completed many, if not most, of the rates applying to interstate commerce will have been established pursuant to affirmative continuing rate-fixing orders of the Interstate Commission. The argument is advanced that if the principle followed by the Circuit Court herein is sound, the Commission's jurisdiction to award reparation will be completely ousted. Somewhat similar contentions are advanced in the brief for the Association of Rail-

way, etc., Commissioners, also appearing as Amicus Curiae.

This contention is quite inconsistent, to say the least, with the position taken by the Interstate Commerce Commission in its latest (1930) annual report to Congress, as indicated by the language quoted above. Moreover, it presents no valid reasons for condemning the sound legal principles upon which the Circuit Court's decision is based. Although it is asserted that in the general investigation it is impossible for the Commission to determine reasonable individual rates, that is precisely what the Commission has undertaken to do in every decision thus far rendered therein. It has prescribed individual rates, and revised individual rules and practices, and it has emphasized, e. g., in the *Grain Case* (164 I. C. C. 619, 661) and in the *Livestock Case* (176 I. C. C. 1, 83), that its findings have been rendered under appropriate provisions of the Act and that the rates prescribed are "reasonable rates". It has issued affirmative orders requiring the carriers to readjust their individual rates to conform to those prescribed or found reasonable. Those findings are by law conclusive if jurisdictionally made; compliance therewith cannot be avoided except under pain of severe penalty. The carriers by accepting and obeying those orders fulfill their duty under the law, as interpreted for them by the only tribunal having final authority. The result may be—doubtless will be—that as to a large

body of traffic moving under the rates prescribed, no reparation power will exist; but that result follows from the carriers' obedience to the law and to the Commission's orders, and from the affirmative provisions of the Act which provide that reparation may be awarded only for a violation thereof.

Our opponents' assertion that the Circuit Court's decision, if affirmed, will deprive the Commission of existing jurisdiction over a vast body of interstate traffic is therefore quite erroneous. The Commission will lose no jurisdiction now possessed under the statute; it will still retain the power, which it has always had, to award reparation for violations of law; and it will still be unable, as it always has been, to penalize a carrier's compliance with and obedience to the law which it administers and to its own affirmative and binding orders thereunder. In short, affirmance of the Circuit Court's decision will simply give recognition to the principle that in a regulatory system which contemplates that a governmental tribunal shall fix the lawful rates to be charged by common carriers, there is no room for the theory that private damages may be caused by the assessment of the rates so fixed.

As a matter of fact the exercise of power to award reparation against Commission-made or approved rates would not only fail to promote the essential purposes of the Act, but would work precisely opposite results. One of the primary ends intended to be served by the Act is to secure uniformity and stability

of transportation charges. If the Act were construed as authorizing the Commission to repudiate its own formal decisions in collateral proceedings, and to penalize carriers for having in good faith complied with its formal findings and orders, then that purpose, instead of being promoted, would be completely defeated. No rate, even though fixed by the Commission, could be relied upon as stable, even for a day; neither shipper nor carrier could be certain that a transaction, though carrying the contemporaneous sanction of the Commission, would not thereafter be repeatedly disturbed and readjusted by means of collateral retroactive orders. The fundamental purpose of the Act would be completely overthrown, and confusion rather than stability and certainty would inevitably follow.

(b) The retrospective findings in the Third Case cannot be relied upon as establishing the unreasonableness of the rates charged, for the question whether those findings are valid constitutes the fundamental issue.

Throughout its brief petitioner asserts, as one of the basic propositions upon which its argument rests, that the rates charged upon its shipments were unreasonable "in fact", and argues (Brief, p. 48) that the Commission's finding in the *Third Case* conclusively shows that those rates were unreasonable as alleged. Indeed, this finding constitutes the only basis for the petitioner's repeated assertion of "factual" unreasonableness.

It is also asserted that the respondents have submitted no evidence to show the contrary, and that their only contention has been that the rates were conclusively just and reasonable, not *in fact*, but because of the Commission's prior decision in the *First Case*, which was still in effect without modification at the time the shipments moved.

It must be obvious that the petitioner, in ascribing conclusive effect to the findings made in the *Third Case*, is simply arguing in a circle. The essential question here before the court is whether those findings of unreasonableness, as to the past, were jurisdictionally made and therefore valid. The assertion that they are conclusive simply begs the question, for it assumes that the Commission has acted within its jurisdiction, as to the precise matter with respect to which its jurisdiction is challenged.

Petitioner is also incorrect in asserting that no evidence tending to show that the rates charged were not unjust and unreasonable "in fact" has been submitted by respondents. The rates were in conformity with the Commission's valid findings and continuing valid order in the *First Case*. Both the decision and order in the *First Case*, and the carrier's action in establishing their rates conforming thereto during the continued life of the order, are set forth in the agreed statement of facts (R. 256-258, 263-275). Moreover, if the Commission's findings are to be given conclusive effect, as petitioner contends, those made in the

First Case must be treated as final and binding, for their constitutional and statutory validity has never been questioned, is not now before the court, and must therefore be accepted as established.

(c) The shipper's supposed property right to be charged no more than a just and reasonable rate is fully safeguarded by the charging of a rate conforming to a valid and continuing determination by the Commission.

At pages 18 to 20, and again at page 31, of petitioner's brief, reference is made to decisions which indicate that carriers are entitled only to just and reasonable rates and reasonable compensation for their services; that a shipper has equally a right to be charged no more than a reasonable rate. From these premises it is argued that if a shipper cannot obtain reparation in a proceeding before the Commission, because of a prior investigation and order of the Commission prescribing the rate to be charged, he will be deprived of his property right, without due process of law, if *in fact*[1] the rate charged upon his

(1) *Anadarko Cotton Oil Co. v. A. T. & S. F. Ry. Co.*, supra (20 I. C. C., at pp. 49-50):

"The standard of the law by which the validity of any rate as affected by its amount is determined, is not more definite than that it must be reasonable and just. The test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. In the nature of the case there can be no rule or process whereby the definite absolute maximum limit of reasonableness in the amount of a rate can be fixed with the certainty of a demonstration.

The law imposes upon the carriers the duty of initiating their rates, under the injunction of the statute that they shall be reasonable and just. In the performance of this duty by the car-

shipments was unreasonable, even though in conformity with findings and orders of the Commission in effect at the time his shipments moved. The very statement of this argument exposes its utter fallacy. It assumes that a rate which is maintained in conformity with a conclusive and valid determination of the Commission contemporaneously in effect can, in legal contemplation, be other than just, reasonable and lawful. In our preceding discussion we have shown that, from the legal standpoint, a rate which conforms to such a valid decision of the Commission is thereby conclusively established as just, reasonable, and otherwise lawful, in all respects.

Petitioner's argument likewise assumes that the rate which was charged upon its shipments here involved is shown to have been unreasonable in fact: an assumption which is predicated wholly upon the findings, and the resulting reparation order, in the *Third Case,* and can be justified only if those findings and

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riers they must exercise judgment and discretion by a like resort to existing facts, circumstances, and conditions in the first instance, just as the Commission must later do when the rates are brought in question before it. The carriers are presumed to act in good faith in their exercise of discretion and its practical application, and therefore rates established by the carriers can not be condemned except upon investigation and full hearing. A rate reasonable in view of the circumstances and conditions when it is established may in course of time become unreasonable by virtue of changed circumstances and conditions. It is manifestly impracticable for the carriers or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable." * * *

"Therefore the awarding of reparation by no means necessarily follows the reduction of a rate, whether by the voluntary action of the carriers or by order of the Commission."

that order are valid. But the question of their validity is the essential issue here before the court; and therefore to assume their validity, as the basis for further argument, simply begs the question.

(d) The opinion of the Circuit Court recognizes that a carrier's compliance with an affirmative order prescribing a reasonable maximum future rate fulfils the obligation under the Act to maintain and charge just and reasonable rates.

At page 22 of its brief, in the course of an attempt to analyze the opinion of the Circuit Court of Appeals in the case at bar, petitioner asserts that that opinion recognizes that the carriers, although complying with a so-called "maximum rate order" of the Commission, were still under a duty to fix and charge a just and reasonable rate, and were not relieved of that duty by compliance with the "maximum rate order". In its analysis, petitioner has overlooked various portions of the opinion which show that the court in fact reached conclusions directly opposed to petitioner's inferences. For example, the Circuit Court said (R. 446):

> "We are in accord with the apparent conclusion of the Commission that its order fixing a maximum rate was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity of a reasonable and just rate and that the carrier in establishing its tariffs as required by the Commission was justified in fixing its various rates within the maximum thus established, and that the order of the Commis-

sion amounted to a decision that rates fixed by the carrier below the maximum it had established were just and reasonable."

(R. 450):

> "In view of the history of the legislation and its cardinal purpose, it is clear that the maximum rate to be fixed by the Commission must be a reasonable rate. * * * In numerous decisions by the courts considering the question of freight rates * * * the court has invariably referred to the administrative power of the Commission as a power to fix rates that are reasonable."

In other words, the court recognized that a maximum rate fixed by the Commission must necessarily be lawful: i. e., inherently just and reasonable; and that the carriers, in complying with the Commission's rate-fixing order, discharged the obligation imposed by the Act to maintain and apply just and reasonable charges.

(c) Petitioner's review of the course of the proceedings before the Commission is erroneous in certain particulars.

At pages 23 and 24 of its brief, petitioner illustrates its argument by referring to the course of the litigation in the *Second* and *Third Cases*. It points out that the rate published in compliance with the order in the *First Case* became effective on September 17, 1921 (which is correct), and that on November 3, 1922, certain shippers at Phoenix filed a complaint with the Commission attacking the rates then in effect.

That statement is likewise correct. However, petitioner is in error in its further assertion that decision upon this complaint was not made until March 12th, 1928, and that during all the period from November 3, 1922, until March 12, 1928, the petitioner and other Phoenix shippers were compelled to pay the challenged rates. The Commission's decision in the *Second Case* was rendered in January, 1925, and an order prescribing reduced rates for the future was issued. The reduced rate (71 cents) became effective February 25, 1925. *While the Second Case was subsequently reopened, the order prescribing future rates therein was not vacated; and the 71-cent rate continued in effect until 1928, when the decision in the Third Case was rendered.* In that decision the Commission found that the 71-cent rate which it had previously prescribed was, as applied to shipments from northern California to Phoenix, less than a reasonable maximum rate, and that 73 cents would have been just and reasonable. In short, there was no such excessive delay in the disposition of the proceedings as petitioner's erroneous statement implies; on the contrary, petitioner, and other shippers, obtained for three years the benefit of a rate materially lower than that which the Commission subsequently determined would have been proper. They have retained that advantage, for of course the carriers are powerless, under the law, to recover the difference (over $12.00 per car) between their lawfully published rate and the higher basis subsequently found reasonable by the Commis-

sion. That sum was irretrievably lost to the carriers because of the Commission's error of judgment.

(f) A valid legislative determination made by the Commission is conclusive in a subsequent judicial proceeding, either in court or before the Commission.

At pages 25 and 26 of petitioner's brief, it is said that the Commission, acting in a *judicial* capacity, has a right to determine, in view of facts then before it, whether a rate attacked for purposes of reparation was "in fact" just and reasonable; and that the fact that the Commission, acting *legislatively*, has previously prescribed that rate or a higher rate cannot be conclusive in a judicial proceeding. It is also said that it is the duty of the Commission, acting in its judicial capacity, to determine whether under the particular facts and circumstances before it, the rate as applied was just and reasonable.

We challenge directly petitioner's assertion that a rate previously prescribed by the Commission, in its legislative capacity, is not conclusive in a judicial proceeding. The decisions of this court, without exception, sustain the proposition that a valid order of the Commission prescribing the reasonable level of a rate for the future is conclusive upon review by the courts, provided only that the Commission has acted within its jurisdiction and upon adequate evidence. Its determination has the force and effect of a statute, for it is made by the Commis-

sion as the delegated agent of Congress. Petitioner concedes (Brief, p. 26), as perforce it must, that a court or a judicial body is bound, in any action it may take, by the law in effect at the time the asserted cause of action arose. It follows that the Commission, acting judicially to award reparation, must be bound by the statutory determination which was outstanding and unmodified at the time the shipments moved; and that as long as it acts as a court, it cannot modify that determination or proceed upon any other basis. Of course, if it undertakes, in its administrative capacity, to make a retroactive modification of a prior legislative act, its action, to the extent that it would deprive carriers of property lawfully vested, is forbidden by the due-process clause.

(g) The decision in the Baltimore and Ohio Case (279 U. S. 781), does not sustain petitioner's contention.

At pages 27 and 28 of its brief, petitioner refers to this court's decision in:

> *Baltimore & Ohio R. R. Co. v. U. S.* (1929), 279 U. S. 781.

In that case this court held that when an order of the Commission purporting to adjust divisions of joint rates as between carriers was set aside as invalid, the court could, as part of the relief granted, order a restoration of funds paid under the erroneous order. The decision obviously has no application to the instant case. The Commission, in the *Third Case* was not

undertaking, as a court of review, to decide whether the legislative order in the *First Case* was erroneous or invalid. It made no finding to that effect. Indeed, the findings and order in the *First Case* have never been alleged to be erroneous, invalid, or illegal. On the contrary, they were accepted by all parties, carriers and shippers alike, became effective in due course, were faithfully complied with, and continued in effect without modification until superseded on February 25, 1925, by the order prescribing future rates made in the *Second Case*. The principle of the *Baltimore & Ohio Case* applies only to decisions of the Commission which are set aside as invalid, *in a direct court proceeding*, in which their validity is challenged. It could not possibly apply in the case at bar, where there has been no direct, but at best only a collateral inquiry, and the *validity* of the prior order has never been called into question.

(h) Affirmance of the Circuit Court's decision will impose upon the Commission no greater duty of supervision over the rate-structure than is now placed upon it by law.

At page 39 of its brief, petitioner argues that a rate, though once prescribed, does not necessarily remain for all times just and reasonable; and review and approval by the Commission do not guarantee that the rate will be just and reasonable at all times thereafter, or until the Commission orders a change. It is also said (Petitioner's Brief, p. 41) that if the Circuit Court's decision is sustained, it will be neces-

sary for the Commission to exercise constant supervision of all rates, and that an impossible task will thus be imposed upon the Commission.

We may concede the abstract principle that a rate once established does not remain forever just and reasonable. However, it must be remembered that affirmative orders of the Commission prescribing rates which the carriers must observe are, by the very terms of the statute, continuously in effect until thereafter changed, unless the order itself embodies some inherent limitation. Practically without exception, orders of the Commission fixing rates for the future are given continuing effect, subject of course to the Commission's power to vacate or modify them prospectively. No matter what change of conditions may take place, carriers cannot revise a rate upward, once it has been prescribed, without prior approval. Since their *discretion* to advance rates is thus taken away, equally their *obligation* to revise them downward must be regarded as suspended. On the one hand, they must observe the limitations enforced by the Commission's superior judgment; therefore they should, on the other, be permitted to rely upon that judgment as the measure of their duty.

Nor is it correct to say that affirmance of the Circuit Court's decision would require of the Commission any task not now imposed upon it by law. It is now its duty to exercise constant supervision over all interstate rates of railway common carriers. Under Section 12 (1) of the Act the Commission is authorized *and required* to execute and enforce the provisions of

the Act. Under Section 13 (1, 2) the Commission is required to investigate rates and practices of common carriers, either upon complaint of interested parties or *upon its own motion.* Under Section 15(7) the Commission is empowered, either upon complaint or *upon its own initiative* to suspend and investigate the lawfulness of any schedule filed with it, stating any new rate, fare, or charge, or any new regulation or practice affecting such rate, fare, or charge. Under Section 15-a(2) the Commission is required, in the exercise of its power to prescribe just and reasonable rates, to initiate, modify, establish or adjust such rates to the end that carriers as a whole or by groups will earn aggregate annual net railway operating income equal to a fair return upon their carrier property. Finally, by the so-called "Hoch-Smith Resolution" (January 30, 1925; 43 Stat. L. 801) the Commission was expressly directed to make a thorough investigation of the rate-structure of carriers subject to the Act in order to correct any illegalities and defects which might be found to exist. We are here referring only to the more outstanding provisions of the Act which impose an affirmative and continuing duty of supervision upon the Commission. The Hoch-Smith Resolution does not, of course, direct the Commission to continue its investigation indefinitely; but it does require that the investigation be thorough; and it is a matter of common knowledge that it is still in progress at present, and apparently far from concluded.

At pages 46 and 47 petitioner asserts that it is admitted that the Act does not specifically restrict the

Commission from allowing reparation when it finds a rate unreasonable, because such rate is equal to or less than a previously approved maximum rate—in the opinion of the Circuit Court such restriction is placed upon the Commission only by implication. While we have already discussed this contention at some length it is desirable to review it again briefly.

The opinion of the Circuit Court does not admit of the interpretation asserted by our opponents; on the contrary, it agrees with our contention that the Act, by express provision, specifically and directly forbids the Commission to award reparation under such circumstances. The Act permits the Commission to exercise its reparation power, *only* when there has been a violation of the Act, by a carrier subject to its provisions. The Circuit Court properly holds that a carrier's publication and assessment of a rate conforming to a binding and valid determination, by the Commission, of the reasonable maximum rate to be charged for the service, is not a violation of the statute; that hence there is no basis for an award of reparation under the Act; and that in attempting to make such an award, the Commission has acted in excess of its statutory powers, and its attempted order is therefore void.

Conclusion.

Our discussion has perhaps extended to undue length, and our apologies are therefore tendered to the Court. We feel, however, that the issue is of our

standing importance, and that full discussion is necessary; moreover, we are undertaking to reply to the arguments not of one, but of several, opponents.

The petitioner's argument, throughout its brief, depends upon two essentially erroneous premises: *first*, that the rates charged upon its shipments were unreasonable *in fact*, at the time of their assessment; and *second*, that the Commission in the *First Case* prescribed a maximum rate which was not also inherently just, reasonable and otherwise lawful. As to the first assumption, there is absolutely no proof of unreasonableness, except that afforded by the Commission's retroactive finding in the *Third Case*, and the subsequent reparation order. Both that finding and order are void because they were not made by the Commission in pursuance of jurisdiction conferred upon it by the Interstate Commerce Act and permitted to it by the Fifth Amendment. Moreover, to assume that the finding and order afford a valid basis upon which the argument may be predicated is to assume that they were jurisdictionally made, and thus to assume in advance a favorable answer to the very issue which is before this court for decision. It must be apparent that in this respect petitioner's argument simply begs the question.

As to petitioner's second fundamental premise, we submit that the rate prescribed in the *First Case* could not have been other than just, reasonable and lawful; that this conclusion is supported by the overwhelming weight of the authorities, for indeed no opposing authority is referred to by our opponents.

It may be observed in fact that the petitioner is alone in making the contention that the rate prescribed in the *First Case* was other than just and reasonable; neither the Interstate Commerce Commission, nor the others who appear herein as Amici Curiae agree with or support its contention. Since petitioner's argument is based upon these fundamental erroneous premises its entire argument necessarily fails.

The respondents believe that the decision of the Circuit Court is correct in every essential particular and should be affirmed. The Circuit Court has recognized the controlling principles established by statute and by the decisions of this court, and has in effect reached conclusions as follows:

(1) The Commission, when it makes a valid decision and order in its legislative capacity, prescribing or approving the reasonable maximum rate thereafter to be charged, thereby conclusively determines, for the period of approved operation of its decision and order, the measure of a just and reasonable rate in the premises, since it is the only body which has final administrative power to decide what is a just and reasonable rate.

(2) A carrier's compliance with and obedience to such a decision and order, throughout its effective period, completely discharges the duty imposed by the Act to maintain and charge just and reasonable rates, since the carrier in effect adopts and follows the conclusive and binding determination of the only tribunal which has final authority in the premises.

(3) The Act confers power upon the Commission to award damages only when a violation of the Act is proven, as a result of which a shipper has suffered pecuniary loss. Since the charging by a carrier of a rate equal to or less than that fixed by the Commission as a reasonable maximum cannot by its very terms be a violation of the Act, the Commission has no power, under the statute, to award *reparation* in such circumstances.

(4) If the Act were so construed as to permit the Commission to determine, retroactively, that a rate which it had previously fixed as reasonable was unreasonable during the period of approved operation of its earlier decision, and to award damages for a carrier's compliance with the earlier decision, it would to that extent be unconstitutional, in violation of the due-process clause of the Fifth Amendment.

The Circuit Court has not undertaken, by its decision, to amend the Act by implication or by judicial construction, nor has it invoked the Constitution in order to strike from the Act any provision which it has heretofore contained. The Circuit Court has simply applied the plain provisions of law which now limit the Commission's power to award reparation to those instances where it is shown that the statute has been violated, to the damage of a shipper. By their application it has construed the Act as forbidding the Commission to attempt, by such awards, to attach retroactive penalties to transactions which at the time of their inception and completion were in accordance with the outstanding valid continuing pronouncements

of the Commission, and carried its contemporaneou approval.

We ask the court to conclude that carriers are n to be penalized in damages for having obeyed vali findings and orders of the Commission; that when carrier complies with the law and the Commission conclusive determination, it cannot thereafter be de clared to have violated the law and compelled to re spond in damages for doing the very thing which th law authorized and required. The judgment of the Cir cuit Court, holding that the Commission was withou jurisdiction under the Act to make the reparatio order here in suit, and that such order is void and o no effect, should be affirmed with costs to the re spondents.

Respectfully submitted,

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Dated at San Francisco, California,
November 20, 1931.

(APPENDIX FOLLOWS.)

Appendix.

Section 1, paragraphs 4, 5 (49 U. S. C. 1, 4, 5; 34 Stat. 584, as reenacted in 1920, 41 Stat. 474);

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; *Provided,* That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Gov-

ernment, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further,* That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

Section 8, (49 U. S. C. 8; 24 Stat. 382);

Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9, (49 U. S. C. 9; 24 Stat. 382);

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the

right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 12, paragraph 1 (49 U. S. C. 12, 1; 26 Stat. 743) in part:

Sec. 12 (1): * * * And the Commission is hereby authorized and required to execute and enforce the provisions of this Act; * * *.

Section 16, paragraph 1, (49 U. S. C. 16, 1; 41 Stat. 491);

Sec. 16. (1) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.